APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed August 6, 2003]

Nos. 02-7844, 02-9361, 02-3087

THEO GARB, BELLA JUNGEWIRTH, SAM LEFKOWITZ, PETER KOPPENHEIM, JUDAH WELLER, CHANA LEWKOWICZ, SAMUEL GOLDIN, KARL DIAMOND, HALA SOBOL, SAUL KLAUSNER and GOLDIE KNOBEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

REPUBLIC OF POLAND, MINISTRY OF THE TREASURY OF POLAND (MINISTERSTWO SKARBU PANSTWA), JOHN DOES #1-100 AND MINISTRY OF THE TREASURY OF POLAND (MINISTERSTWO SKARBU PANSTWA),

Defendants-Appellees.

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTA LEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZ URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FÜRST, ERNST B. RIVIN-RIESENFELD, LIZZY RAPP-BAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL, and ROBERT KLEIN,

Plaintiffs-Appellees,

v.

REPUBLIC OF AUSTRIA, DOROTHEUM GMBH, a/k/a DOROTHEUM AUKTIONS-, VERSATZ-, UND BANKGESELLSCHAFT MBH, ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Defendants-Appellants,

VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, BÖHLER UDDEHOLM AG, ÖMV AG, RAIFFEISEN ZENTRAL ÖSTERREICHISCHE BANK A.G., STEYR-DAIMLER-PUCH AG, a/k/a STEYR DAIMLER-PUCH SPEZIALFAHRZEUG AG, a/k/a STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG, AUSTRIAN DOE CORPORATIONS 1 TO 100, ERSTE BANK DER OESTERREICHISCHEN SPARKASSEN AG,

Defendants.

In re REPUBLIC OF AUSTRIA, DOROTHEUM GMBH & CO KG, and ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Petitioners.

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTALEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZ URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FÜRST, ERNST B. RIVIN-RIESENFELD, LIZZY RAPP-BAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL, and ROBERT KLEIN,

Plaintiffs-Respondents,

v.

REPUBLIC OF AUSTRIA, DOROTHEUM GMBH, a/k/a DOROTHEUM AUKTIONS-, VERSATZ-, UND BANKGESELLSCHAFT MBH, ÖSTERREICHISCHE *INDUSTRIEHOLDING AG*,

Defendants-Petitioners,

VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, BÖHLER UDDEHOLM AG, ÖMV AG, RAIFFEISEN ZENTRAL ÖSTERREICHISCHE BANK A.G., STEYR-DAIMLER-PUCH AG, a/k/a STEYR DAIMLER-PUCH SPEZIALFAHRZEUG AG, a/k/a STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG, AUSTRIAN DOE CORPORATIONS 1 TO 100, ERSTE BANK DER OESTERREICHISCHEN SPARKASSEN AG,

Defendants.

Present: AMALYA L. KEARSE, EJOS A. CABRANES, and CHESTER J. STRAUB, *Circuit Judges.*

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERIAL ESTOPPEL OR RES JUDICATA.

As a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 6th day of August, two thousand and three.

Consolidation of (1) appeal in *Garb v. Poland*, No. 02-7844, from June 26, 2002 judgment entered by the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief Judge*) dismissing plaintiffs' claims; (2) appeal in *Whiteman v. Austria*, No. 02-9361, from a discovery order of the United States District Court for the Southern District of New York (Shirley Wohl Kram, *Judge*); and (3) No. 02-3087, a petition for writ of mandamus filed by several defendants in *Whiteman v. Austria* to compel the

United States District Court for the Southern District of New York (Shirley Wohl Kram, *Judge*) to decide a motion to dismiss. The consolidated appeals present the questions, *inter alia*, whether and on what terms the federal courts have jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611, to adjudicate the liability of foreign governments for actions preceding the FSIA's enactment.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment and order of the District Courts be and hereby are VACATED AND REMANDED, and the petition for writ of mandamus be and hereby is DENIED.

Plaintiffs in these consolidated matters are Jews (and their heirs and successors) who seek relief from abuses and deprivations allegedly effected by defendant states and their instrumentalities during and subsequent to World War II.

Plaintiffs in *Garb v. Poland*, No. 02-7844, are Jewish former citizens of Poland who claim that the Polish government wrongfully confiscated their land following World War II pursuant to an official post-war policy encouraging the migration of surviving Jews through the dispossession of Jewish property. Plaintiffs argue that their claims are authorized by two exceptions to sovereign immunity under the FSIA: the "commercial activity" exception, 28 U.S.C. § 1605(a)(2), and the "takings" exception, 28 U.S.C. § 1605(a)(3). The District Court granted defendants' motion to dismiss with respect to both claimed exceptions. *See Garb v. Poland*, 207 F. Supp. 2d 16, 33 (E.D.N.Y. 2002). Plaintiffs appeal the judgment of the District Court.

In *Whiteman v. Austria*, Nos. 02-9361 and 02-3087, plaintiffs are present and former Jewish citizens and residents of Austria who lost property under the Nazi regime in Austria from 1938 until 1945. They allege the extensive involvement

of defendants-appellants in the confiscation and continued ownership of specific property, including works of art recently offered for auction in the United States. Plaintiffs argue that their claims are authorized under exceptions to the FSIA for "commercial activity," 28 U.S.C. § 1605(a)(2), "takings," 28 U.S.C. § 1605(a)(3), and waiver, 28 U.S.C. § 1605(a)(1). The District Court ordered the parties to engage in limited discovery on the threshold question of jurisdiction. *Whiteman v. Austria*, 00 Civ. 8006, slip op. at 5 (S.D.N.Y. June 10, 2002). The District Court entered a further order denying defendants' application that the Court decide a motion to dismiss prior to requiring them to undergo jurisdictional discovery. *Whiteman v. Austria*, No. 00 Civ. 8006, 2002 WL 31368236, at *8 (S.D.N.Y. Oct. 21, 2002). Defendants appealed the discovery order, No. 02-9361, then filed a petition for writ of mandamus to compel the District Court to decide their motion to dismiss, No. 02-3087.

Each of the instant cases raises the threshold questions whether and on what terms the federal courts have jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611, to adjudicate the liability of sovereign states for conduct occurring prior to the statute's enactment.

Another panel of this Court recently held in *Abrams v. Société Nationale Des Chemins De Fer Francais*, 332 F.3d 173 (2d Cir. 2003), that whether the FSIA applies retroactively in a particular case depends on whether such application would have an impermissible "retroactive effect"—that is, whether applying the FSIA would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 180-81 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (internal quotation marks omitted)). This determination requires "a commonsense, functional judgment about whether

the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 185 (quoting *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal quotation marks omitted)). The *Abrams* Court therefore concluded that whether or not the FSIA applied retroactively to alleged offenses that occurred prior to the statute's enactment depended on whether the plaintiffs in a particular case "could have legitimately expected to have their claims adjudicated in the United States prior to the FSIA's enactment." *Id.* at 186. Such a determination requires the District Court to conduct a factual inquiry into the sovereign immunity enjoyed by the particular state—in *Abrams*, France; in the instant cases, Poland and Austria—prior to the enactment of the FSIA. *See id* at 186-87.

As our Court recognized in *Abrams*, the general history of United States policy on sovereign immunity is well established. *See id.* at 176-78. Judicial determinations of jurisdiction over sovereign states prior to the FSIA "usually deferred to the decision of the executive" regarding sovereign immunity, which was often expressed in the form of a "suggestion of immunity" filed by the Department of Justice at the request of the Department of State. *Id.* at 176-77. In this manner, "the executive branch played a prominent role in deciding whether a foreign sovereign was immune from suit in American courts." *Id.* at 176. "Prior to 1952, the United States adhered to the absolute theory of foreign sovereign immunity," but that year the Department of State "announced [a] formal change of policy" to the "restrictive theory of sovereign immunity." *Id.* at 177. Under the new theory, sovereign states retained immunity from claims challenging their "governmental activities," but they no longer enjoyed immunity in United States courts from "claims arising out of [their] commercial activities." *Id.*

In *Abrams* the Court found that this general history of sovereign immunity was insufficient to support a factual

determination of the legitimate expectations of a corporation wholly owned by the French government with respect to sovereign immunity, given the "prominent role" of case-by-case recommendations from the Department of State in sovereign immunity determinations prior to the passage of the FSIA. *See id.* at 176, 186-88. Accordingly, the Court remanded to allow the District Court to undertake a factual inquiry into the Department of State's position prior to the FSIA on sovereign immunity for such an entity. *See id.* at 188.

Faced with this development in the law of the Circuit since we heard oral argument in these matters, we remand for determinations of the Department of State's policy prior to FSIA with respect to sovereign immunity for Poland and Austria in the circumstances presented in each of the instant cases. We note that on remand there exists the possibility that specific evidence of the Department of State's position with respect to a particular country during a given period of time and in the circumstances presented may not exist, and thus that we may generally be forced to rely for such factual determinations on the overarching policies of the Department of State prior to the FSIA, which we acknowledged in *Abrams*. *See id.* at 177 (outlining Department of State policy prior to the FSIA, particularly the Department's "formal change of policy" in 1952 from the "absolute theory" of sovereign immunity to the "restrictive theory" of sovereign immunity). Before so relying, however, we remand to give the parties the opportunity to present particular evidence relevant to the Department of State's position on the sovereign immunity of the nation whose conduct is in question in their particular cases. We direct the District Courts to invite the participation of the Department of State in developing a record to support their determinations.[1]

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[1] We caution the District Courts that the necessary factual inquiry

Finally, although we remand these cases to two different District Courts, we direct those Courts to coordinate their proceedings as much as possible, insofar as such coordination may avoid duplication of judicial proceedings, hearings, and other efforts by counsel, and otherwise preserve scarce judicial and other resources. We also direct the District Courts to coordinate their proceedings temporally to the extent possible, in order to allow for the continued consolidation of these cases on any future appeals.

For the foregoing reasons, (i) the June 26, 2002 judgment in *Garb v. Poland* entered by the United States District Court for the Eastern District of New York is VACATED; the discovery order in *Whiteman v. Austria* of the United States District Court for the Southern District of New York is VACATED; the petition by defendants-appellants in *Whiteman v. Austria* for writ of mandamus, No. 02-3087, is DENIED; and the causes are REMANDED for further proceedings consistent with this order.

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should be conducted with appropriate attention to separation-of-powers concerns, inasmuch as the conduct of foreign relations is delegated to the political branches, *see generally Am. Ins. Ass'n v. Garamendi*, 123 S.Ct. 2374, 2386 (2003), and the adjudication of claims that risk significant interference with foreign relations policy may raise justiciability concerns, *see Kadic v. Karadzic*, 70 F.3d 232, 248-49 (2d Cir. 1995).

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. NEW YORK

No. 99 Civ. 3487(ERK).

THEO GARB, *et al.*,

Plaintiffs,

v.

REPUBLIC OF POLAND and Ministry of Treasury of Poland (Ministertwo Skarbu Panstwa),

Defendants.

MEMORANDUM & ORDER

KORMAN, *Chief Judge*.

The complaint in this case arises out of the near total annihilation of the Jews of Poland by the Nazis during World War II and the subsequent horrendous treatment of the small number who survived. Prior to the War, Poland had the largest Jewish population in all of Europe—more than three million Jews. The overwhelming majority of these Jews died during the War or were murdered by the Nazis and their Polish collaborators. A small number of Polish Jews fled to Palestine. The majority of those who were fortunate to escape the horrors of the Holocaust moved eastward and sought refuge in the Soviet Union. After the War, on July 6, 1945, the Soviet Union and Poland entered into a repatriation agreement whereby 230,000 of these Polish Jews returned to Poland.

Many of the surviving Jews were in "horrible condition[;] . . . they [were] exhausted, starved and half-naked, or in rags

. . . [and] sick." (Stein Aff. ¶ 9.) They arrived to find Poland "in a state of chaos and ruin." (*Id.* ¶ 5.) Much of their "property had been adversely possessed for as long as five years by the time of liberation and repatriation." (Pls.' Mem. at 5.) Tensions over that property sparked a renewal of violence against the Jews. During the first two years after the war, more than 1,000 Jews were murdered. (Stein Aff. ¶ 10.)

Post–War violence against the Jews culminated in a riot which occurred on July 4, 1946 in Kielce, Poland. (Am.Compl.¶ 93.) A local boy's accusation of kidnaping by a mentally disabled Jew ignited simmering tensions between Jewish and non-Jewish residents of the town. (Stein Aff. ¶¶ 15–16.) A crowd gathered around a building that housed nearly 200 Jews. According to plaintiffs' affidavit, Polish army officers disarmed the Jewish residents of the building and forced them into the hands of the mob, whereupon 41 Jews were killed. (*Id.* ¶ 17.) Some historians believe that the riot was planned and implemented by Polish security officials and communist party higher-ups. (*Id.* ¶¶ 22–34.) Although nine individuals alleged to have participated in the Kielce riot were tried and executed, the army officers and security officials allegedly responsible for the riot were arrested, but never tried. (*Id.* ¶¶ 20, 22.)

Violence against Jews did not end after Kielce. Thirty-three other Jews were murdered that month. (Am.Compl. ¶ 93.) Jewish property was looted. (*Id.*) The result of this post-war violence was that the vast majority of the few remaining Jews in Poland chose to emigrate by 1946, leaving behind their property and possessions. (*Id.* ¶ 95.) Anti–Semitic violence continued in Poland even after this mass immediate post-war emigration. In 1956, there were more than 40 incidents where Jews were beaten or abused. (Stein Aff. ¶ 39.) Plaintiffs allege that the local authorities did not react appropriately to these incidents and cite statements concerning the anti-Semitism of Communist party officials.

(*Id.*) Plaintiffs also allege that in 1967 some 9,000 Jews were purged from the Communist party, the Foreign Ministry, the armed forces and the defense establishment in response to concerns over the development of a "Fifth Column" anti-Communist movement. (*Id.* ¶ 47; Am. Compl. ¶ 96.)

It is undisputed that, after the post- Kielce emigration, Poland nationalized land in 1946–47. Defendants maintain, however, that these nationalization laws affected all Poles and did not target or discriminate against Polish Jews specifically. (Defs.' Reply Mem. at 2; *see* Korzycka –Iwanow Aff. ¶¶ 9–10 (outlining six nationalization statutes enacted by the thengoverning communist regime as a "means of production and central planning and management of the national economy")). According to defendants, laws were enacted relating to the following categories of property: (1) "deserted properties;" (2) "post-German" properties; and (3) "abandoned properties." (Korzycka–Iwanow Aff. ¶¶ 4–5.) The laws provided that "deserted property"—real property that was confiscated by the Nazis or that was the subject of forced sales—was to be returned to its owners, or their legal successors, if a claim application was received by December 31, 1948. (*Id.* ¶ 5.) Conversely, property characterized as "abandoned"—once belonging to the Third Reich or German citizens—became the property of the Treasury. (*Id.*) Plaintiffs allege that the true owners of much of this "abandoned property" were Jews and that this category was established to legitimize the taking of that property by defendants. (Am. Compl.¶ 102.)

On July 16, 1960, an Agreement was signed by Poland whereby it agreed to pay $40 million over a period of twenty years in full settlement of claims by United States nationals arising from the nationalization of property, the appropriation or loss of the use of property by the Polish government, and debts owed by nationalized enterprises or upon property which has been nationalized. *See generally Agreement with*

the Government of the Polish People's Republic Regarding the Claims of Nationals of the United States, July 16, 1960, 11 U.S.T. & O.I.A., T.I.A.S. No. 4545 (1960) ("1960 Treaty"). Claims for war damage and property taken by governments other than Poland were not covered under the agreement. (*Id.*) The Agreement was also restricted to persons who were United States citizens on the date the property was taken by the Polish government. (*Id.*)

Plaintiffs allege that officials of the Polish army and security services incited, participated in, and purposely failed to prevent the Kielce riot and the subsequent anti-Jewish violence—actions "motivated not simply by abstract anti-Semitism, but by a specific desire to prevent Polish Jews from reclaiming their property" after World War II. (Pls.' Mem. at 7.) Plaintiffs also cite a book alleging that the American government had some "official and semiofficial indications provided by the Warsaw government that it is encouraging the migration of the Jews of [a major] part of its Jewish population." (Stein Aff. ¶ 12, citing George Lenczowski, *The Middle East in World Affairs* 330 (1950)). According to plaintiffs, "[a]t all times relevant to the events described herein, ministers, officers, and directors of Poland and [the Ministry of the Treasury] knew, or were in the possession of such information that they should have known, that they were part of an unlawful scheme that (i) resulted in depriving the Jewish Holocaust victims and their heirs of their Properties, and (ii) provided Poland and [the Ministry] with enormous profits from the use and enjoyment of such Properties." (Am. Compl.¶ 108.)

Plaintiffs and class members are "Jewish persons and entities (and their heirs and successors) who owned real property and improvements thereon in Poland during the period September 1, 1939 to May 30, 1945." (Am.Compl.¶¶ 2, 68.) Plaintiffs allege five claims. First, plaintiffs contend that defendants violated customary international law by creating,

participating in, and/or failing to prevent the permanent dispossession of Polish Jews' property in the aftermath of the Holocaust and that defendants then profited commercially from their management of the properties. (Am.Compl. ¶¶ 111–15.) Second, plaintiffs also accuse defendants of wrongfully converting plaintiffs' and other class members' properties for their own use and benefit. (Am.Compl.¶¶ 116–18.) Third, plaintiffs seek an order declaring defendants to be constructive trustees of the property seized and requiring them to turn over the income and profits of that property to plaintiffs and other class members. (*Id.* ¶¶ 119–21.) Fourth, plaintiffs demand an accounting of the amount and disposition of the property seized and of the profits derived therefrom. (*Id.* ¶¶ 122–24.) Fifth, the sub-class of plaintiffs whose property is currently held by a defendant, or any other Polish governmental body, seeks restitution. (*Id.* ¶¶ 125–28.)

DISCUSSION

A. Introduction

The Republic of Poland and its Ministry of the Treasury move pursuant to Federal Rule of Civil Procedure 12(b) to dismiss this action on the ground, *inter alia,* of lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–1611 (2001), which "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 439, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). The Act is composed of both jurisdictional provisions, 28 U.S.C. § 1330, and immunity provisions, 28 U.S.C. §§ 1602–1611. Section 1330(a) grants the district courts "original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement." § 1330(a). Conversely,

§ 1604 entitles foreign states to immunity from the jurisdiction of federal and state courts "except as provided in sections 1605 to 1607 of this chapter" and "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act." § 1604.

"Under the [FSIA], a foreign state is presumptively immune from the jurisdiction of the United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson,* 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). Once the plaintiff has produced evidence showing that one of the Act's specified exceptions applies, the burden shifts to the foreign state to establish that it is immune from the jurisdiction of the United States courts. *Cargill Int'l S.A. v. M/T Pavel Dybenko,* 991 F.2d 1012, 1016 (2d Cir. 1993). In the instant case, plaintiffs rely on two of the exceptions to immunity specified in the FSIA: the commercial activity exception, § 1605(a)(2), and the takings exception, § 1605(a)(3).

The commercial activity exception, § 1605(a)(2), provides, in pertinent part, for the exercise of jurisdiction over a cause of action against a foreign state based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." § 1605(a)(2). The commercial activity exception codifies the law with respect to claims against a foreign state that was in effect since 1952. The premise underlying this exception has been articulated by the Supreme Court as follows:

> Participation by foreign sovereigns in the international commercial market has increased substantially in recent years. The potential injury to private businessmen—and ultimately to international trade itself—from a system in which some of the participants in the international market are not subject to the rule of law has therefore

> increased correspondingly. As noted above, courts of other countries have also recently adopted the restrictive theory of sovereign immunity. Of equal importance is the fact that subjecting foreign governments to the rule of law in their commercial dealings presents a smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves."

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 703–04, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976) (internal citation and footnote omitted).

The takings exception, § 1605(a)(3), provides, in pertinent part, for the exercise of jurisdiction over causes of action if "rights in property taken in violation of international law are in issue" and "that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." § 1605(a)(3). Prior to the enactment of the FSIA in 1976, foreign states enjoyed absolute immunity from suit in the United States for causes of action based on the taking of property. *See Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir.1964). Section 1605(a)(3) maintains the rule of absolute immunity for the foreign state itself (except where the expropriated property is present in the United States), but effects a change in the law by subjecting "an agency or instrumentality" of a foreign state (which includes an organ of the foreign state) to suit in the United States for causes of action that otherwise meet the statutory criteria. The takings

exception requires not only that the property be owned or operated by an agency or instrumentality of the foreign state, but also that the agency or instrumentality be engaged in commercial activity in the United States. The takings exception thus attempts to strike a balance between two seemingly contradictory policies—maintaining immunity for foreign states which expropriate property in violation of international law, while denying immunity to certain constituent parts of the foreign states.

The foregoing discussion requires the consideration of a threshold question presented by this case, namely, the retroactivity of the exceptions to the FSIA upon which plaintiffs rely. The operative events leading to the expropriation of plaintiffs' property occurred prior to 1952, when the defendants enjoyed immunity from suit for their commercial activities and for the expropriation of property, the latter exception continuing until the enactment of the FSIA in 1976. Because the Court of Appeals for the Second Circuit has held that the exceptions to the FSIA that changed prior law cannot be applied retroactively, *Carl Marks & Co. v. Union of Soviet Socialist Republics,* 841 F.2d 26, 27 (2d Cir.1988), it is necessary to discuss the law prior to the enactment of the FSIA and the law regarding the retroactivity of the exceptions upon which plaintiffs rely. I then discuss those exceptions in addressing plaintiffs' claims that the operative act of expropriation occurred in 1957 and that, consequently, the commercial activity exception provides a basis for their cause of action.

B. The Law Prior to the FSIA

Prior to 1952, foreign states enjoyed virtually absolute immunity from the jurisdiction of United States courts. *See Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). The doctrine of absolute immunity originated in an era of personal sovereignty, when the assertion of jurisdiction by one

sovereign over another was thought to constitute an affront to the latter's dignity and independence. As stated by Chief Justice Marshall:

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137, 3 L.Ed. 287 (1812). The issue in *The Schooner Exchange* was whether the district court had jurisdiction over an armed vessel in the service of Napoleon, the emperor of France, the vessel being physically present within the territory of the United States. *Id.* at 116–17, 7 Cranch 116. The Attorney General argued in favor of immunity on the ground that "[t]he right to demand redress belongs to the executive department, which alone represents the sovereignty of the nation in its intercourse with other nations." *Id.* at 132, 7 Cranch 116. Chief Justice Marshall expressly declined to reach the Attorney General's argument, relying instead on the "implied license" theory of immunity set forth in the quotation above in concluding that the district court lacked jurisdiction over the vessel. *Id.* at 146–47, 7 Cranch 116.

The "implied license" theory of immunity subsequently came to be regarded as supporting the extension of immunity to foreign sovereigns even in connection with their commercial activities in the United States. *See Berizzi Bros. Co. v. The Pesaro,* 271 U.S. 562, 574, 46 S.Ct. 611, 70 L.Ed. 1088 (1926). *The Pesaro* was an in rem proceeding against a merchant vessel owned and operated by the Italian government "in the service and interest of the whole Italian

nation." *Id.* at 570, 46 S.Ct. 611. In response to an inquiry from the district court, the State Department took the position that "'government-owned merchant vessels . . . should not be regarded as entitled to the immunities accorded public vessels of war.'" *The Pesaro,* 277 F. 473, 479 n. 3 (S.D.N.Y.1921) (quoting statement of Solicitor of the State Department), *vacated by consent of parties.* The Supreme Court failed even to acknowledge the State Department's position, however, basing its decision instead on the "implied license" theory of immunity developed by Chief Justice Marshall in *The Schooner Exchange. The Pesaro,* 271 U.S. at 571–73, 46 S.Ct. 611. The Court concluded that jurisdiction was lacking over a vessel "held and used by a government . . . for the purpose of advancing the trade of its people or providing revenue for its treasury." *Id.* at 574, 46 S.Ct. 611.

After *The Pesaro,* and with the passing of the era of personal sovereignty, the Supreme Court began to view the doctrine of immunity as a matter of judicial deference to the executive branch of government. *See Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354, 357 (2d Cir. 1964). This shift in the basis of the doctrine first became apparent in *The Navemar,* 303 U.S. 68, 58 S.Ct. 432, 82 L.Ed. 667 (1938), an in rem proceeding against a merchant vessel owned by the Spanish government. *Id.* at 70, 58 S.Ct. 432. The issue in the case was whether the district court was bound to accept as conclusive the "suggestion" of the Spanish ambassador that the vessel was in the Spanish government's possession and control, and therefore entitled to immunity under *The Pesaro. Id.* Noting that the State Department had declined to recognize the Spanish government's claim of possession and control of the vessel, *id.* at 71, 58 S.Ct. 432, the Court stated in dictum that, "[i]f the claim is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to release the vessel upon the appropriate suggestion by the Attorney General of the United States." *Id.* at 74, 58 S.Ct.

432. Absent recognition of the claim by the State Department, the district court was not bound to accept as conclusive the Spanish ambassador's suggestion, and the issue of the Spanish government's possession and control of the vessel was an "appropriate subject[ ] for judicial inquiry upon proof of the matters alleged." *Id.* at 75, 58 S.Ct. 432.

Subsequent decisions in *Ex Parte Republic of Peru,* 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943), and *Republic of Mexico v. Hoffman,* 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729 (1945), firmly established judicial deference to the executive branch as the basis for the doctrine of foreign sovereign immunity. In *Ex Parte Republic of Peru,* the State Department formally recognized the Peruvian government's claim that a merchant vessel owned by it was immune from jurisdiction. 318 U.S. at 581, 63 S.Ct. 793. The Supreme Court held:

> Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations. [Citing *The Navemar* and *The Schooner Exchange.*] This practice is founded upon the policy, recognized both by the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.

Id. at 588–89, 63 S.Ct. 793. In *Hoffman,* by contrast, the State Department took no position with respect to the asserted immunity of a merchant vessel owned by the Mexican government but not in its possession or control. 324 U.S. at 31–32, 65 S.Ct. 530. The Court held that, even "[i]n the absence of recognition of the claimed immunity by the political branch of the government," the district court was

bound to decide whether immunity existed "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations." *Id.* at 34–35, 65 S.Ct. 530. Stated otherwise, "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 35, 65 S.Ct. 530. As the State Department had declined to recognize the immunity claim both in the case at bar and in *The Navemar,* which was factually similar, the Court concluded that the Mexican vessel was subject to the jurisdiction of the district court. *Id.* at 37–38, 65 S.Ct. 530.

Despite this shift in the basis of the doctrine of sovereign immunity, foreign states continued to enjoy virtually absolute immunity from suit in the United States prior to 1952, even in connection with their commercial activities. *See Verlinden,* 461 U.S. at 486, 103 S.Ct. 1962 ("Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns."). Indeed, where a foreign state was named as a defendant in an in personam action, it was invariably held to be immune from the jurisdiction of the district court, whether or not the State Department had made a suggestion of immunity. *See Puente v. Spanish Nat'l State,* 116 F.2d 43, 45 (2d Cir.1940) (Spanish government held immune upon suggestion of Spanish ambassador); *Sullivan v. State of Sao Paulo,* 122 F.2d 355, 358–59 (2d Cir.1941) (citing *Puente* and holding that constituent states of Brazil were immune upon suggestion of Brazilian ambassador); *Piascik v. British Ministry of War Transport,* 54 F.Supp. 487, 487–88 (S.D.N.Y.1943) (citing *Ex Parte Republic of Peru* and holding that British Ministry of War Transport was immune upon suggestion of Secretary of State).

In 1952, the State Department announced, in the so-called Tate Letter, its adoption of the "restrictive" theory of

sovereign immunity. Letter of Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman, May 19, 1952, *reprinted in* 26 Dep't of State Bull. 984–85 (1952) and *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 711–15, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). Under this theory, "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Alfred Dunhill,* 425 U.S. at 711, 96 S.Ct. 1854 (quotation from text of Tate Letter). Legal Adviser Tate cited the following reasons for the State Department's adoption of the theory: (i) most civil law countries had already adopted it; (ii) the Government of the United States did not claim immunity when sued in foreign courts in contract or tort; and (iii) "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." *Id.* at 714, 96 S.Ct. 1854. Under *Ex Parte Republic of Peru* and *Hoffman,* the courts were bound to apply the restrictive theory of immunity adopted by the State Department in the Tate Letter. *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354, 358–59 (2d Cir.1964).

The commercial activity of a foreign state fell into the category of "private" acts for which immunity was denied under the restrictive theory, while expropriation fell into the category of "public" acts for which immunity was recognized. *Victory Transp.,* 336 F.2d at 360. In *Victory Transport,* the Comisaria General, a branch of the Spanish Ministry of Commerce, argued, *inter alia,* that its purchase of wheat pursuant to the Surplus Agricultural Commodities Agreement to help feed the people of Spain constituted a public act for which it was entitled to immunity. *Id.* at 361. The Comisaria General had made a request to the State Department for a suggestion of immunity, to which the State

Department had failed to reply. *Id.* at 358–59. The Second Circuit denied the Comisaria General's immunity claim, observing that only certain categories of acts, including "legislative acts, such as nationalization," qualified as the "strictly political or public acts" for which immunity was always recognized under the restrictive theory, even if, in any particular instance, the State Department failed to make a suggestion of immunity to the court. *See also Am. Hawaiian Ventures, Inc. v. M.V.J. Latuharhary,* 257 F.Supp. 622, 626–27 (D.N.J.1966) (Indonesian government immune from suit for alleged expropriation of plaintiff's property).

The immunity recognized by the courts prior to the enactment of the FSIA extended to the political subdivisions of a foreign state, including its departments and ministries, and, often, to other entities that performed governmental functions. *See, e.g., Oliver Am. Trading Co. v. Gov't of the United States of Mexico,* 5 F.2d 659, 661 (2d Cir.1924) (Mexican National Railways held immune). As explained by the Second Circuit in *Oliver:*

> While the action is nominally against both the government of Mexico and the National Railways in Mexico, it is in reality a suit only against the Mexican government. For it appears that the National Railways of Mexico is "merely a name" for a system of railroads in the possession of the Mexican government, and has been controlled and operated by Mexico since 1914 for national purposes, just as it operates the Post Office, the Customs Service, or any other branch of the national government.

Id. See also, e.g., United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 202–03 (S.D.N.Y.1929) (distinguishing between "departments of government," entitled to immunity, and state-owned corporations, not entitled to immunity); *Sullivan v. State of Sao Paulo,* 122 F.2d 355, 359–60 (2d Cir.1941) (constituent states of Brazil entitled to

immunity as political subdivisions of foreign state); *Piascik v. British Ministry of War Transport,* 54 F.Supp. 487, 487–88 (S.D.N.Y.1943) (British Ministry of War Transport entitled to immunity as "duly constituted department of the British Government"); *In re Investigation of World Arrangements with Relation to Prod., Transp., Ref. & Distrib. of Petroleum,* 13 F.R.D. 280, 290–91 (D.D.C.1952) (Anglo–Iranian Oil Company entitled to immunity on ground that it performed "fundamental government function serving a public purpose"); *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354, 356–57 (2d Cir. 1964) (branch of Spanish Ministry of Commerce assumed without discussion to be foreign state for immunity purposes).

C. The FSIA and Its Retroactive Effect

In 1976, Congress enacted the FSIA in order to clarify the standards governing foreign sovereign immunity in United States courts and to free the executive branch from the case-by-case diplomatic pressures exerted upon it by foreign states. H.R.Rep. No. 94–1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605–06; *see also Verlinden,* 461 U.S. at 488, 103 S.Ct. 1962. "For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden,* 461 U.S. at 488, 103 S.Ct. 1962. Section 1605(a)(2), for example, denies immunity to foreign states in actions based upon their commercial activities carried on in the United States or causing a direct effect in the United States. Section 1605(a)(3) is also consistent with pre-FSIA law to the extent that it maintains the immunity of foreign states in actions based upon the taking of property (except where the property is located in the United States). In other respects, however, the enactment of the FSIA effected a change in the law of foreign sovereign immunity. Of particular significance in the context of the present discussion, § 1605(a)(3) subjects any "agency or instrumentality" of

a foreign state to suit in the United States where "rights in property taken in violation of international law are at issue," provided that the agency or instrumentality owns or operates the property and is engaged in commercial activity in this country. The definition of "agency or instrumentality" under the FSIA could under some circumstances encompass certain departments or ministries of a foreign state. *See* H.R. No. 94–1487, at 15–16, *reprinted in* 1976 U.S.C.C.A.N., at 6614 ("As a general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including . . . a department or ministry which acts and is suable in its own name."). The denial of immunity to the Ministry of the Treasury of Poland under the circumstances here would clearly conflict with pre-FSIA law, which did not distinguish between a foreign state and its departments or ministries, and which recognized the absolute immunity of foreign states in all actions based on their public acts, including expropriation.

In *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988), the Second Circuit held that the FSIA could not be applied retroactively to a claim that arose in 1918. The plaintiffs in *Carl Marks* were holders of debt instruments issued by the Russian Imperial Government in 1916. *Id.* at 27. In 1918, after the fall of the Imperial Government, the Bolshevik regime repudiated all foreign loans, including the debt instruments held by plaintiffs. *Id.* The Second Circuit held that, while the issuance of public debt fell within the commercial activity exception of the FSIA, § 1605(a)(2), the district court lacked jurisdiction over the suit, because:

> Such a retroactive application of the FSIA would affect adversely the USSR's settled expectation, rising to the level of an antecedent right, of immunity from suit in American courts. We believe, as did the district court, that only after 1952 was it reasonable for a foreign

> sovereign to anticipate being sued in the United States courts on commercial transactions.

Carl Marks, 841 F.2d at 27 (citations and internal quotation marks omitted). Because the plaintiffs' claim arose before the State Department's issuance of the Tate Letter in 1952, the Second Circuit observed that it "need not decide the effect of the FSIA on causes of action arising between 1952 and the enactment of the Act." *Id.; see also Jackson v. People's Republic of China*, 794 F.2d 1490, 1497–98 (11th Cir.1986) (holding that Chinese government was immune from suit for its default on bonds that matured in 1951, because "to give the [FSIA] retrospective application to pre–1952 events would interfere with antecedent rights of other sovereigns").

Plaintiffs here argue that the Second Circuit's decision in *Carl Marks* does not preclude retroactive application of the FSIA to their claims, because Poland could not have had a "settled expectation" of immunity for the discriminatory taking of Jewish property after World War II. (Pls.' Mem. at 15–20.) This argument is difficult to reconcile with the premise that a clear consensus did not exist with respect to the issue whether expropriation by a foreign sovereign of property belonging to its own citizens violates the law of nations—even where the expropriation was part of a scheme of religious persecution of Jews in Nazi Germany. *See Filartiga v. Pena–Irala*, 630 F.2d 876, 888 n. 23 (2d Cir.1980) (distinguishing such conduct, which formed the basis for the cause of action in *Dreyfus v. Von Finck*, 534 F.2d 24 (2d. Cir.1976), from torture, which was at issue in *Filartiga*). Nor can it be reconciled with the act of state doctrine, which holds that:

> [T]he judicial branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling

legal principles, even if the complaint alleges that the taking violates customary international law.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). *Cf. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976) ("We decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations.").

Indeed, the extent to which the act of state doctrine posed an obstacle to an action of the kind brought here is demonstrated by the sad case of a Jewish victim of Nazi persecution who was imprisoned in 1937 and compelled by force, threats of physical violence and duress to transfer his property, which was eventually converted by a Dutch corporation to its own use in 1939. *Bernstein v. N.V. Nederlandsche–Amerikaansche Stoomvaart–Maatschappij*, 173 F.2d 71, 72–73 (2d Cir.1949). After initially dismissing a civil suit due to the act of state doctrine, *id.* at 75–76, the Second Circuit reversed itself, deferring to a State Department recommendation for jurisdiction over "suits for [the return of] identifiable property involved in Nazi forced transfers." *Bernstein v. N.V. Nederlandsche–Amerikaansche Stoomvaart–Maatschappij*, 210 F.2d 375, 375–76 (2d Cir.1954). Only this "supervening expression of Executive Policy" permitted an action to proceed against a private party. *Id.* at 376.

The doctrine of sovereign immunity differs from the act of state doctrine because it goes to the issue whether a foreign state can be forced to defend a cause of action in the United States, while the act of state doctrine supplies the rule of decision if jurisdiction is exercised over the claim. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705 n. 18, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). Indeed, the House Judiciary Committee report describing the exception to the doctrine of sovereign immunity for cases involving the expropriation of property in violation of international law

emphasizes that it "deals solely with issues of immunity, [and] it in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable." H.R. No. 94–1487, at 20, *reprinted in* 1976 U.S.C.C.A.N., at 6618. I merely cite this choice of law rule, which often overlaps the doctrine of sovereign immunity, *Alfred Dunhill*, 425 U.S. at 705 n. 18, 96 S.Ct. 1854, to show that, even without reference to the doctrine of sovereign immunity, there is reason to question the premise that Poland would have had any expectation of being held to account here for its conduct at the time it occurred.

The real issue, however, is whether, prior to the adoption of the FSIA in 1976, Poland enjoyed immunity from suit in the United States for the discriminatory taking of Jewish property even if other legal principles did not stand in the way of the successful prosecution of such an action. The answer is that a foreign state did enjoy such immunity prior to the enactment of the FSIA. To the extent that the FSIA overruled prior law, the holding in *Carl Marks* makes clear that it cannot be applied retroactively. Also unsustainable is plaintiffs' argument that defendants' conduct has been, and is, ongoing. Plaintiffs cite *Asociacion De Reclamantes v. United Mexican States*, 561 F.Supp. 1190 (D.D.C.1983), *aff'd*, 735 F.2d 1517 (D.C.Cir.1984), and *Von Dardel v. Union of Soviet Socialist Republics*, 623 F.Supp. 246 (D.D.C.1985), *vacated on other grounds*, 736 F.Supp. 1 (D.D.C.1990), in support for this argument. In *Reclamantes*, however, the Mexican Government had consistently acknowledged its obligation to pay the plaintiffs' claims, even after the suit was brought, *Reclamantes*, 561 F.Supp. at 1195, while in *Von Dardel*, the Soviet Union's alleged detention of Raoul Wallenberg was considered an "ongoing tort" because there was some evidence that Wallenberg might still be alive, notwithstanding the Soviet Union's representation that he had died in 1947, *Von Dardel*, 623 F.Supp. at 249–50, 260. *See also Carl Marks & Co. v. Union of Soviet Socialist Republics*, 665

F.Supp. 323, 348–49 (S.D.N.Y.1987), *aff'd*, 841 F.2d 26 (2d Cir.1988). Here, because defendants have not acknowledged the validity of plaintiffs' claims, and because those claims are not based on the ongoing tortious detention of a person, neither *Reclamantes* nor *Von Dardel* is apposite.

Although plaintiffs do not expressly so argue, some courts have held that the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), establishes the full retroactivity of the FSIA and thus effectively overrules the Second Circuit's decision in *Carl Marks*. *See, e.g., Haven v. Rzeczpospolita Polska (Republic of Poland)*, 68 F.Supp.2d 943, 946 (N.D.Ill.1999) (FSIA applicable to claims virtually identical to those asserted here); *Altmann v. Republic of Austria*, 142 F.Supp.2d 1187, 1201 (C.D.Cal.2001) (FSIA applicable to claim for taking of artwork by Nazis in 1938); *see also Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1170 (D.C.Cir. 1994) (suggesting, but not deciding, that "all questions of foreign sovereign immunity, including those that involve an act of a foreign government taken before 1976, are to be decided under the FSIA"). In *Landgraf*, the Supreme Court provided an analytical framework for determining the retroactivity of a statute. *See Landgraf*, 511 U.S. at 263–80, 114 S.Ct. 1483. The issue in the case was whether certain provisions of the Civil Rights Act of 1991—creating a right to recover compensatory and punitive damages for specified violations of Title VII and providing for trial by jury if such damages were claimed—applied to a case pending on appeal when the provisions were enacted. *Id.* at 247–49, 114 S.Ct. 1483. In deciding that issue, the Court outlined a two-step process for determining the retroactivity of a statute. *Id.* at 280, 114 S.Ct. 1483. First, it must be determined "whether Congress has expressly prescribed the statute's proper reach." *Id.* "If Congress has done so, of course, there is no need to resort to judicial default rules." *Id.* Second, if the statute contains no such express command, it must be determined

"whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute would have such an effect, the "traditional presumption against retroactivity teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

The first step in the *Landgraf* analysis is easily resolved in this case. The text of the FSIA does not express a clear congressional intent that the statute be applied retroactively. *Carl Marks & Co. v. Union of Soviet Socialist Republics,* 665 F.Supp. 323, 336–37 (S.D.N.Y.1987), *aff'd,* 841 F.2d 26 (2d Cir.1988). The second step in the *Landgraf* analysis is to determine whether application of the FSIA to plaintiffs' claims would have "a genuinely 'retroactive' effect." *Landgraf,* 511 U.S. at 277, 114 S.Ct. 1483. Elaborating on this step in the analysis, the Court stated:

> We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. [. . .] Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell [v. Commons,* 239 U.S. 506, 508, 36 S.Ct. 202, 60 L.Ed. 409 (1916)]. Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties," *Republic Nat. Bank of Miami [v. United States,* 506 U.S. 80, 100, 113 S.Ct. 554, 121 L.Ed.2d 474 (1992)] (Thomas, J., concurring).

Landgraf, 511 U.S. at 274, 114 S.Ct. 1483. *See, e.g., Andrus v. Charlestone Stone Prods. Co.,* 436 U.S. 604, 607 n. 6, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978) (statute eliminating amount-in-controversy requirement in federal question cases

applied retroactively); *Bruner v. United States*, 343 U.S. 112, 116–17, 72 S.Ct. 581, 96 L.Ed. 786 (1952) (statute repealing district court's jurisdiction over wage actions brought by employees of United States applied retroactively); *The Assessors v. Osbornes*, 76 U.S. 567, 575, 9 Wall. 567, 19 L.Ed. 748 (1869) (statute repealing Circuit Court's jurisdiction over cases arising under internal revenue laws applied retroactively); *see also United States v. Alabama*, 362 U.S. 602, 604, 80 S.Ct. 924, 4 L.Ed.2d 982 (1960) (statute conferring jurisdiction on district courts over actions against states applied retroactively to case in which plaintiff sought only prospective injunctive relief).

Nothing in the Court's decision in *Landgraf* overruled the Second Circuit's ruling in *Carl Marks* that a foreign state's settled expectation of immunity from the jurisdiction of the United States courts "ris[es] to the level of an antecedent right," *Carl Marks*, 841 F.2d at 27 (internal quotation marks omitted). Indeed, as the quotation set forth in the preceding paragraph shows, the Court simply reaffirmed in *Landgraf* the principles of retroactivity that it had been applying since at least as early as its decision in *Hallowell v. Commons*, 239 U.S. 506, 36 S.Ct. 202, 60 L.Ed. 409 (1916). Moreover, the Court's conclusion in *Landgraf*—that the relevant provisions of the Civil Rights Act of 1991 did not apply retroactively, *Landgraf*, 511 U.S. at 293, 114 S.Ct. 1483—provides no support for the argument that the FSIA applies retroactively.

Particularly apposite here is *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997). The issue in *Hughes* was the retroactivity of an amendment to the *qui tam* provision of the False Claims Act, 31 U.S.C. § 3730(b), which permits, in certain circumstances, a suit by a private party on behalf of the United States against anyone submitting a false claim to the Government. *Id.* at 941, 117 S.Ct. 1871. Prior to 1986, such a suit was barred if the Government already had possession of the information on

which the suit was based. *Id.* A 1986 amendment to the False Claims Act partially removed that bar. *Id.* The plaintiff in *Hughes* brought suit under the False Claims Act based on conduct predating the effective date of the amendment and argued that the amendment, which he needed to maintain his suit, should apply to his claim. *Id.* at 946, 117 S.Ct. 1871. In support of his claim, the plaintiff contended that the amendment did not increase the defendant's liability for past conduct; it merely affected whether a private party could bring suit on behalf of the United States. *Id.* at 948, 117 S.Ct. 1871. More generally, the plaintiff argued that the 1986 amendment was merely jurisdictional and, therefore, an exception to the general *Landgraf* presumption against retroactivity. *Id.* at 950, 117 S.Ct. 1871. The Court rejected the plaintiff's argument, holding:

> The 1986 amendment . . . does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

Id. at 951, 117 S.Ct. 1871 (emphasis in original). To the extent that the FSIA *created* jurisdiction over certain types of suits against foreign sovereigns, it is similar to the *qui tam* provision of the False Claims Act.

The Court's decision in *Verlinden* also supports the Second Circuit's ruling in *Carl Marks* that the FSIA should not be applied retroactively to the extent that it adversely affects a foreign state's settled expectation of immunity from suit in the United States courts. The issue in *Verlinden* was whether Congress, in enacting the FSIA, had exceeded the scope of Article III by granting the district courts subject-matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where the rule of decision was

provided by state law. *Verlinden,* 461 U.S. at 491, 103 S.Ct. 1962. The Court held that the enactment of the FSIA was a proper exercise of Congress's power to regulate foreign commerce, observing that:

> As the House Report [on the FSIA] clearly indicates, the primary purpose of the Act was to "se[t] forth comprehensive rules governing sovereign immunity," H.R.Rep. No. 94–1487, at p. 12; the jurisdictional provisions of the Act are simply one part of this comprehensive scheme. The Act thus does not merely concern access to the federal courts. Rather, it governs the type of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law [citing *Ex Parte Republic of Peru* and *Hoffman*]; and applying those standards will generally require interpretation of numerous points of federal law.

Id. at 496–97, 103 S.Ct. 1962. The Court's opinion thus made clear that sovereign immunity is an issue of substantive, not merely jurisdictional, law.

The preceding analysis suggests that the takings exception of the FSIA should not apply retroactively insofar as it allows jurisdiction over a claim brought against a department or ministry of a foreign state, since immunity would have been recognized with regard to such a claim prior to the enactment of the FSIA. By contrast, the commercial activity exception of the FSIA should apply retroactively to claims arising since the State Department's adoption of the Tate Letter in 1952. Plaintiffs argue that their claims arose in 1957, when, under Polish law, the property that they had abandoned during the War escheated to the Polish state. (*See* Korzycka Aff. Ex. C (decree, dated March 8, 1946, at art. 37)). Under these circumstances, if plaintiffs could satisfy the conditions of the commercial activity exception of the FSIA, the defendants

would not enjoy sovereign immunity. I need not determine whether plaintiffs' claims arose in 1947, as defendants maintain, or in 1957, as plaintiffs maintain, because, as the following discussion will show, even if plaintiffs' claims arose in 1957, they do not fall within the commercial activity exception. Likewise, although I do not finally resolve the issue, plaintiffs would very likely fail to satisfy the conditions of the takings exception.

D. The Exceptions to FSIA Immunity

1. The Commercial Activity Exception

The commercial activity exception provides that a foreign state is not immune from the jurisdiction of the United States courts if:

> the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

Plaintiffs allege that defendants' actions fall within the third clause of this exception. Under that clause, defendants are not immune if the expropriation: (1) took place outside of United States territory; (2) occurred "in connection with" a commercial activity; and (3) caused "a direct effect" in the United States. *Id.* Since the expropriation of plaintiffs' land occurred in Poland, only the latter two requirements are in dispute.

The commercial activity exception of the FSIA is intended to cover a foreign state's activities as a private player in the marketplace, not to expose a foreign state to liability for its

sovereign activities. *See Hanil Bank v. Pt. Bank Negara Indonesia, (Persero),* 148 F.3d 127, 131 (2d Cir.1998) (citing *Saudi Arabia v. Nelson,* 507 U.S. 349, 360, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993)); *see also Alfred Dunhill,* 425 U.S. at 699, 96 S.Ct. 1854 ("[T]he policy supporting the restrictive view of immunity . . . is to assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts whenever possible."). Consequently, the Second Circuit requires "a 'substantive connection' or a 'causal link' between [the operative acts in the suit] and the commercial activity." *Filetech S.A. v. France Telecom S.A.,* 157 F.3d 922, 930–31 (2d Cir. 1998) (quoting *Hanil Bank,* 148 F.3d at 130); *see also Hanil Bank,* 148 F.3d at 130 (issuance of letter of credit, and subsequent failure to honor it, satisfied "in connection" requirement). Otherwise, the "in connection" language of § 1605(a)(2) could be read "to include tangential commercial activities to which the 'acts' forming the basis of the claim have only an attenuated connection, [and] the 'commercial activity' exception would effectively be rewritten to authorize the exercise of jurisdiction over acts that are essentially sovereign in nature." *Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galadari,* 12 F.3d 317, 330 (2d Cir.1993) (citing *Foremost–McKesson, Inc. v. Islamic Republic of Iran,* 905 F.2d 438, 450 (D.C.Cir.1990)).

Plaintiffs argue their property was taken outside the United States "in connection" with its subsequent ownership and commercial operation. There are undoubtedly commercial consequences to that expropriation. Plaintiffs have attached a brochure produced by the Ministry that offers for sale real estate in the Polish city of Bialystok—some of which it is alleged was formerly plaintiffs' property. (*See* Garland Decl. at Ex. C.) Plaintiffs also allege, without citing to any evidence, that defendants have used United States financial institutions to maintain the properties and the profits therefrom. (Am. Compl.¶¶ 11–14.) Defendants do not contest

that advertising and banking are commercial activities. Instead, they maintain that these activities are too attenuated from the operative acts in this suit to satisfy the "in connection" requirement.

"[T]he phrase ['based upon' in § 1605(a)(2)] is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Nelson,* 507 U.S. at 357, 113 S.Ct. 1471 (citations omitted). Plaintiffs' claims—alleging a violation of customary international law, conversion, constructive trust, and seeking equitable accounting as well as restitution —are "based upon" the manner in which the property was obtained, not its subsequent management. "Expropriation is a quintessentially sovereign act and is never viewed as having commercial character." *Pena–Perez v. Procuraduria General De Justicia of Nicaragua,* No. 96 Civ. 0168, 1997 WL 122823, at *2 (S.D.N.Y. Mar.17, 1997) (citing *Carey v. National Oil Corp.,* 453 F.Supp. 1097, 1102 (S.D.N.Y.1978), *aff'd,* 592 F.2d 673 (2d Cir. 1979)); *see Baglab Ltd. v. Johnson Matthey Bankers Ltd.,* 665 F.Supp. 289, 294 (S.D.N.Y.1987) ("The nationalization of a bank is a quintessentially sovereign activity and may not serve as the basis for a suit against the Bank."). On facts virtually identical to those alleged in this action, Judge Shadur ruled that "[i]t is obvious that governmental expropriation of private property under governmental authority—whether legitimate or illegitimate—is the classic [sovereign] activity. . . . Whatever else may be said of the Governmental Defendants' alleged conduct, it is not 'commercial activity.'" *Haven,* 68 F.Supp.2d at 954.

Plaintiffs cannot "escape the requirements of § 1605(a)(3) through artful recharacterization of their takings claim." *Chuidian v. Philippine Nat'l Bank,* 912 F.2d 1095, 1106 (9th Cir.1990) (ruling that a claim that was "in substance a taking of property, not a tortious injury to property[,]" must be pled under § 1605(a)(3)); *see de Sanchez v. Banco de Nicaragua,*

770 F.2d 1385, 1398 (5th Cir.1985) (noting that "Congress [could not have] intended plaintiffs to be able to rephrase their takings claims in terms of conversion and thereby bring the claims even where the takings are permitted by international law"); *Alberti v. Empresa Nicaraguense De La Carne,* 705 F.2d 250, 254 (7th Cir. 1983) (ruling that § 1605(a)(2) does not apply where there was "no controversy" concerning the commercial activities subsequent to the nationalization); *but see Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 710 (9th Cir.1992) (ruling that defendants' expropriation of plaintiffs' property was performed "in connection with" defendants' subsequent commercial management and operation of the property). On this point, *Siderman* is unsupported by the legislative history of the FSIA and principles of statutory construction. The House Report on the Act provides examples of activities which should be considered "commercial" for the purposes of § 1605(a)(2) and others which should be considered governmental. The former include commercial transactions undertaken to achieve a governmental end. *See* H.R.Rep. No. 94–1487, at 16, *reprinted in* 1976 U.S.C.C.A.N., at 6615 (citing contracts to buy military provisions or construct a governmental building). Conversely, governmental activities with potential commercial implications do not qualify as commercial activities under the FSIA. *See id.* (citing foreign state's participation in foreign assistance program administered by United States government). Also, as a matter of statutory construction, the commercial activity exception requires the basis for the suit to be commercial. Otherwise, the commercial activities exception would subsume the FSIA's expropriation exception in § 1605(a)(3); every expropriation of property has some commercial implications.

Even if the "in connection" requirement of the third clause of § 1605(a)(2) has been satisfied, plaintiffs have failed to allege a "direct effect" of the alleged expropriation in the United States. The "direct effect" test focuses on whether the

effect of defendants' activity is "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case[.]" *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir.1981). An effect is direct if "it follows 'as an immediate consequence of defendant's . . . activity.'" *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) (quoting *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir.1991)). In addition, the Second Circuit has held that the specific conduct causing the direct effect in the United States must be legally significant to the cause of action. *See Filetech*, 157 F.3d at 931 (citing *Hanil Bank*, 148 F.3d at 133, and *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 34–35 (2d Cir.1993)).

Plaintiffs cite two "direct effects" of defendants' actions—neither of which satisfies the requirements of the "direct effect" test. First, plaintiffs point to the adversely affected class members who reside in the United States as directly affected by defendants' actions. This effect, however, is insufficient as a matter of well-settled law. "[T]he fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the [commercial activity] exception . . . If a loss to an American individual and firm resulting from a foreign tort were sufficient standing alone to satisfy the direct effect requirement, the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states." *Antares Aircraft*, 999 F.2d at 36. Second, plaintiffs contend that defendants advertised the expropriated property for sale in the United States and that defendants have used financial institutions in the United States to maintain the property. Even assuming that these activities were an element of the "act" upon which plaintiffs' action is based, they are insufficient to satisfy the "legally significant acts" test. This is because the activities allegedly causing a "direct effect" in the

United States—the advertising of the property in the United States and the use of United States financial institutions to maintain the property—have no legal significance to this action. Thus, plaintiffs cannot avail themselves of the commercial activity exception to the FSIA.

2. The "Takings in Violation of International Law" Exception

Because I have concluded that the takings exception of the FSIA does not apply to confer jurisdiction for a claim arising prior to its enactment, it is unnecessary for me to address the merits of plaintiffs' argument. Nevertheless, I discuss the takings exception in some detail in order to frame the issue should the Court of Appeals conclude that my retroactivity analysis is flawed. The takings exception provides that a foreign state shall not be immune from the jurisdiction of the United States courts if:

> rights in property taken in violation of international law are in issue and [i] that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or [ii] that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]

28 U.S.C. § 1605(a)(3).

Since the property at issue here is in Poland, only the second clause of this exception can apply. Under this clause, plaintiffs must show that: (i) the property was taken in violation of international law; (ii) that property, or any property exchanged for that property, is owned or operated by an "agency or instrumentality" of the foreign state; and (iii) that agency or instrumentality was engaged in a commercial activity in the United States. *Id.*

Citing to the fact that many of the plaintiffs appear to have been Polish citizens at the time of expropriation, defendants argue that, as a matter of well-settled law, a foreign state's expropriation of the property of its own nationals is not a violation of the "law of nations." *See Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d. Cir.1976) (finding that "violations of international law do not occur when the aggrieved parties are nationals of the acting state"). Most courts that have considered such expropriation have ruled that it does not violate international law. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir.1992) (holding that takings exception did not apply to claims of plaintiffs who were citizens of defendant country); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir.1990) ("Expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law."); de *Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395–98 (5th Cir.1985) (holding that breach by Nicaragua of its own citizen's contractual right was not violation of international law). Moreover, in a number of these cases, the alleged expropriation was motivated by religious discrimination. *See Dreyfus*, 534 F.2d at 31 (dismissing suit for lack of jurisdiction where Jewish plaintiff, a former German citizen, sought restitution for the wrongful confiscation of his property in Nazi Germany in 1938); *Siderman*, 965 F.2d at 711 (expropriation did not violate international law despite evidence indicating that it was motivated by religious discrimination).

While the Second Circuit has rejected the broad premise of *Dreyfus* that international law does not constrain the conduct of a foreign state with respect to its own citizens, *Filartiga v. Pena–Irala*, 630 F.2d 876, 884–85 (2d Cir.1980) (foreign state's torture of its own citizens violates international law), it has held that, in contrast to the right of a citizen to be free from torture, "no consensus existed" on the issue whether the right to be free from the discriminatory and uncompensated

taking of property was one of the "fundamental rights" conferred by international law "upon all people vis-a-vis their own governments," *id.* at 884–85, 888 n. 23 (citing *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 425, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)). *Sabbatino* concluded that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." *Sabbatino,* 376 U.S. at 428, 84 S.Ct. 923; *see also Alfred Dunhill,* 425 U.S. at 704, 96 S.Ct. 1854.

Moreover, even if the plaintiffs could overcome this hurdle, it is also arguable whether they could satisfy the other predicates for the takings exception. Unlike the first clause of § 1605(a)(3), which permits jurisdiction over takings claims against foreign states provided that the expropriated "property or property exchanged for such property is *present in the United States* " (emphasis added), the second clause of this exception, governing property located outside the United States, requires that the property in question be "owned or operated by an agency or instrumentality of the foreign state." If the property is owned and operated by the foreign state itself or one of its political subdivisions, then jurisdiction cannot lie under the second clause of § 1605(a)(3).

The FSIA does not define the term "foreign state," providing only that it "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a). Subsection (b) of § 1603 in turn provides:

> An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or

> other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). Obviously, as plaintiffs concede, the Republic of Poland is not an "agency or instrumentality" of a foreign state, but the parties differ as to the status of the Ministry of the Treasury. The issue is whether the Ministry is, on the one hand, the foreign state itself or a subdivision of it, or, on the other hand, an "agency or instrumentality" of the Republic of Poland and therefore potentially subject to jurisdiction under the second clause of § 1605(a)(3).

The Ministry of the Treasury would appear to be an integral part of Poland's political structure, and its core function—to hold and administer the property of the Polish state—is indisputably governmental. (*See* Kostorkiewicz Aff. at ¶ 16 ("The Ministry is part of the central government of Poland and exists to act on behalf of the Republic of Poland. By statute, the Ministry manages property, including land, on behalf of the Polish state.")). Moreover, defendants have submitted the affidavit of the former Director of the Legal Office of the Polish Senate stating that the Ministry "does not hold property separately from the Polish State" and that the Ministry "represents the Polish State with respect to financial claims brought against the State." (Kostorkiewicz Aff. at ¶ 16.) Defendants have also attached statutes to the affidavit confirming that the Ministry holds property on behalf of the Polish state. Article 44(1) of the Polish Civil Code provides that "[o]wnership and other property rights which constitute State property belong to State Treasury or to state legal persons." (*Id.* at Ex. C.) Similarly, Article 3.2 of the Law of August 8, 1996 on the Exercise of State Treasury Powers vests the Treasury "with property rights to State-owned assets, unless separate regulations specify that other state

legal entity is vested with such rights." (*Id.*) Defendants' affidavit and the statutes attached thereto, which may properly be considered pursuant to Federal Rule of Civil Procedure 44.1, establish that the Ministry of the Treasury is an integral part of the Republic of Poland. It is true, of course, that these statutes refer to the Ministry as a "state legal entity," and that the Ministry is subject to the jurisdiction of the Polish courts, (*id.* at ¶ 4). Nevertheless, it is arguable whether these minimal independent characteristics alone suffice for this particular Ministry to be viewed as an entity separate from the Republic of Poland under the circumstances here.

The Court of Appeals for the D.C. Circuit has held that the legal status of a foreign governmental entity under the FSIA "depends on whether [it] is the type of entity 'that is an integral part of a foreign state's political structure, [or rather] an entity whose structure and function is predominantly commercial.'" *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 30 F.3d 148, 151 (D.C.Cir.1994) (quoting *Segni v. Commercial Office of Spain,* 650 F.Supp. 1040, 1041–42 (N.D.Ill.1986)). The issue in *Transaero* was whether the Bolivian Air Force qualified as an agency or instrumentality of Bolivia and could therefore be served with process under § 1608(b) of the FSIA. *Transaero,* 30 F.3d at 151. The Departments of State and Justice filed an amicus brief in the case arguing that the Court of Appeals should consider not just the form of the entity, but also its core function, and whether a judgment against the entity would be paid out of the treasury of the foreign state. Brief of Amicus Curiae United States at 9– 16, *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 30 F.3d 148 (D.C.Cir.1994) (No. 92–7222). The D.C. Circuit adopted the Executive Branch's analysis, holding that "the armed forces [of a sovereign state] are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the 'foreign state'

itself, rather than a separate 'agency or instrumentality' of the state." *Id.* at 153. The D.C. Circuit reasoned that:

> Any government of reasonable complexity must act through men organized into offices and departments. If a separate name and some power to conduct its own affairs suffices to make a foreign department an "agency" rather than a part of the foreign state itself, the structure of section 1608 will list too far to one side. We hold that the armed forces of a foreign sovereign are the "foreign state" . . . .

Id.

In *Haven v. Rzeczpospolita Polska (Republic of Poland),* 68 F.Supp.2d 943 (N.D.Ill.1999), a case involving the same claims as the one at bar, Judge Shadur appears to have followed the D.C. Circuit's approach in holding that the Ministry of the Treasury was "in tautological terms" the foreign state itself under the FSIA. *Id.* at 944; *see also Haven v. Rzeczpospolita Polska (Republic of Poland),* 68 F.Supp.2d 947, 957 (N.D.Ill.1999), *aff'd,* 215 F.3d 727 (7th Cir.2000) (discussing applicability of second clause of § 1605(a)(3) only with respect to insurance company defendants). *See also First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 618 n. 5, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) ("The Ministry of Foreign Trade is no different than the Government of Cuba of which its minister is a member.") (quoting district court's decision in the course of reinstating it, *Banco Nacional De Cuba v. Chase Manhattan Bank,* 505 F.Supp. 412, 425 (S.D.N.Y. 1980)).

The D.C. Circuit's approach in *Transaero* is consistent with the common understanding of the structure of a government instrumentality. As the Supreme Court observed in *First National City Bank:*

> A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes

> the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.
>
> These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies. These same features frequently prompt governments in developing countries to establish separate juridical entities as the vehicles through which to obtain the financial resources needed to make largescale national investments.

First Nat'l City Bank, 462 U.S. at 624–25, 103 S.Ct. 2591 (footnotes omitted). The Tennessee Valley Authority was cited as "perhaps the best known of the American public corporations." *Id.* at 625 n. 15, 103 S.Ct. 2591.

The discussion in *First National City Bank* distinguishes between "government agencies" and "government instrumentalities." Nevertheless, the FSIA definition of the term "agency or instrumentality" suggests that Congress was using the two words interchangeably to encompass quasi-independent commercial instrumentalities of the kind described in that case. The denial of sovereign immunity to such entities "enables third parties to deal with the instrumentality by knowing that they may seek relief in court." *Id.* at 625, 103 S.Ct. 2591. While the House Report envisioned that, "[a]s a

general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including . . . a department or ministry which acts and is suable in its own name," *see* H.R. No. 94–1487, at 15– 16, *reprinted in* 1976 U.S.C.C.A.N., at 6614, the Ministry of the Treasury of Poland can hardly be viewed as an entity separate from the Republic of Poland. More significantly, the same is true, even if the Ministry's status could arguably be dependent on the nature of the activities underlying the cause of action. The conduct that forms the basis of the cause of action here, holding title to the property expropriated by the Republic of Poland, makes it impossible to hold that the Ministry is separate from the Republic. *Cf. Banco Nacional de Cuba v. First Nat'l City Bank of New York*, 478 F.2d 191, 194 (2d Cir.1973) (facts of case showed that National Bank of Cuba's function in expropriation of property made it "a mere arm or division of the Cuban government"). A contrary holding would undermine the immunity that Congress conferred on the Republic. As the United States observed in its amicus brief in *Transaero:* "If the judgment would essentially be one against the state and an entity's assets are not separate from those of the state, then the entity is not a legal person separate from the state even if, in a formalistic sense, that entity can enter into contracts in its own name, and sue or be sued in its own name." Brief of Amicus Curiae United States at 17, *Transaero* (No. 92–7222). Indeed, this is the standard adopted by the Supreme Court in determining whether an agency or instrumentality of a state is entitled to the Eleventh Amendment immunity enjoyed by the state. *Hess v. Port–Auth. Trans–Hudson Corp.*, 513 U.S. 30, 50–51, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994).

This approach is also consistent with the language of the FSIA, which defines a foreign state as including its political subdivisions as well as its agencies and instrumentalities. 28 U.S.C. § 1603(a). While the Act treats agencies and

instrumentalities differently from the foreign state itself for a variety of purposes, *see, e.g.*, 28 U.S.C. §§ 1606 (liability for punitive damages), 1608 (service of process), 1610 (attachment and execution), including takings claims of the kind present here, it makes no distinction between political subdivisions and the foreign state itself. A scholarly commentary on the FSIA observes that "[s]o long as an entity functions essentially in a political or governmental capacity while subordinated in some fashion to a foreign state itself, the entity is a political subdivision of a foreign state. Political subdivisions therefore include both units of local or regional government, *or units of the national government which do not represent the government as a whole*." Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 19 (1988) (emphasis added). The Second Circuit has adopted this interpretation of the term "political subdivision," holding that an Italian public financial entity qualified as a political subdivision under the FSIA. *O'Connell Mach. Co. v. M.V. "Americana"*, 734 F.2d 115, 116–17 (2d Cir.1984) (quoting H.R. No. 94–1487, at 15, *reprinted in* 1976 U.S.C.C.A.N., at 6613 (stating that "[t]he term 'political subdivisions' includes all governmental units beneath the central government")).

Numerous other courts have assumed without discussion that governmental departments or ministries qualify as political subdivisions of a foreign state under the FSIA. *See, e.g., Magness v. Russian Fed'n*, 247 F.3d 609, 613 n. 7 (5th Cir.2001) (characterizing Russian Ministry of Culture as political subdivision of Russia for purposes of service of process); *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1298 (11th Cir.2000) (characterizing Yemeni Ministry of Supply & Trade as political subdivision of Yemen for purposes of determining legal status of entity controlled by Ministry); *Kao Hwa Shipping Co. v. China Steel Corp.*, 816 F.Supp. 910, 914 (S.D.N.Y.1993) (characterizing Taiwanese Ministry of Economic Affairs as political subdivision of

Taiwan for purposes of determining legal status of entity owned by Ministry); *see also Filus v. LOT Polish Airlines,* 819 F.Supp. 232, 236–37 (E.D.N.Y.1993) (Nickerson, J.) (characterizing Ministry of Civil Aviation of USSR alternately as foreign state itself and as political subdivision thereof for purposes of service of process).

In sum, it is arguable whether in the instant case the Ministry of the Treasury can be viewed as a legal entity separate from the Republic of Poland. On the contrary, it appears to be an integral part of the Republic of Poland or a political subdivision thereof; any money judgment here would be paid by the Republic of Poland, and any order directing the return of expropriated property would compel the Ministry of the Treasury to divest itself of property held on behalf of the Republic of Poland, assuming that the Ministry still holds title to it. Under these circumstances, permitting the cause of action here would appear to undermine the immunity Congress intended to confer on the Republic of Poland under the FSIA.

E. The Waiver of Sovereign Immunity

Plaintiffs' final argument is that defendants impliedly waived their sovereign immunity by violating the *jus cogens* norms of international law in "unleash[ing] a wave of mob violence directed at Jews" and in subsequently expropriating their property. (*See* Defs.' Mem. at 22.) A *jus cogens* norm " 'is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'" *Siderman,* 965 F.2d at 714 (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679). "While commentators may disagree on the exact scope of all *jus cogens* norms, there is universal consensus on the existence of norms against

genocide and enslavement." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1180 (D.C.Cir.1994) (Wald, J., dissenting).

The theory that a foreign state should be deemed to have forfeited its sovereign immunity whenever it engages in conduct that violates fundamental humanitarian standards was formulated after the enactment of the FSIA. *See Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242 (2d Cir.1996) (citing Adam C. Belsky, Mark Merva, Naomi Roht–Arriaza, Comment, *Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 Calif. L.Rev. 365 (1989)). Prior to the enactment of the FSIA, the courts found an implied waiver of foreign sovereign immunity only where a foreign state brought suit in the United States or took some other action related to the conduct of litigation that manifested an intention to waive immunity. *See, e.g., Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356, 364, 75 S.Ct. 423, 99 L.Ed. 389 (1955) ("It is recognized that a counterclaim based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity."); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("[F]airness has been thought to require that when the sovereign seeks recovery, it be subject to legitimate counterclaims against it."). The House Report on the FSIA gave other examples of implied waiver under prior law:

> With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive

> pleading in an action without raising the defense of sovereign immunity.

H.R. No. 94–1487, at 18, *reprinted in* 1976 U.S.C.C.A.N., at 6617.

Section 1605(a)(1) of the FSIA provides that a foreign state "shall not be immune from the jurisdiction of courts in the United States [if] the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). In *Smith v. Socialist People's Libyan Arab Jamahiriya,* 101 F.3d 239 (2d Cir.1996), the Second Circuit squarely "reject[ed] . . . the claim that a *jus cogens* violation constitutes an implied waiver [of foreign sovereign immunity] within the meaning of the FSIA." *Id.* at 245. The Second Circuit began its discussion of the doctrine of implied waiver by observing that it had "no doubt" that Congress, in enacting the FSIA, "ha[d] the authority either to maintain sovereign immunity of foreign states as a defense to all violations of *jus cogens* . . . or to remove such immunity. . . ." *Id.* at 242. Based primarily on the examples of implied waiver given in the above quotation from the House Report, the Second Circuit concluded that "Congress had not intended to remove the defense" of sovereign immunity for violations of *jus cogens. Id.* at 244. The other courts of appeals that have addressed the issue have all reached the same conclusion. *See Sampson v. Federal Republic of Germany,* 250 F.3d 1145, 1156 (7th Cir.2001) ("Congress did not create an implied waiver exception to foreign sovereign immunity under the FSIA for *jus cogens* violations."); *Princz v. Federal Republic of Germany,* 26 F.3d 1166, 1174 (D.C.Cir.1994) ("We have no warrant . . . for holding that the violation of *jus cogens* norms by the Third Reich constitutes an implied waiver of sovereign immunity under the FSIA."); *Siderman,* 965 F.2d at 719 ("The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA."). Because plaintiffs' claim of implied waiver fails both under pre-FSIA

law and under § 1605(a)(1) of the Act, I need not address the issue of the statute's retroactivity in this context.

CONCLUSION

I have written before that "strong moral claims are [not] easily converted into successful legal causes of action." *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d 139, 149 (E.D.N.Y.2000). I am compelled to dismiss the complaint *not* because of a determination that the conduct challenged here is lawful. The conduct alleged may very well violate the evolving standards of the law of nations. Indeed, a private individual holding title to expropriated property would not enjoy immunity from suit. Moreover, such an individual would arguably be precluded from invoking the act of state doctrine. *See Bigio v. Coca–Cola Co.*, 239 F.3d 440, 451– 53 (2d Cir.2000). The complaint is dismissed solely because the Republic of Poland and its Ministry of the Treasury may not be required to defend the cause of action alleged in the complaint in the United States. The dismissal places on the Republic of Poland the obligation to resolve equitably the claims raised here. Because the dismissal is based on the jurisdictional defense asserted here, I do not address the other grounds urged by defendants in support of their motion to dismiss.

SO ORDERED.

APPENDIX C

UNITED STATES CODE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a

foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of

torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime

lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime juris-

diction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)—

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.—

(1) In general.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request

of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 02-7844

THEO GARB, BELLA YOUNGEWIRTH, SAM LEFKOWITZ, PETER KOPPENHEIM, JUDAH WELLER, CHANA LEWKOWICZ, SAMUEL GOLDIN, KARL DIAMOND, HALA SOBOL, GOLDIE KNOBEL, DAN LIPMAN, and WILLIAM Z. ZIMMERSPITZ

Plaintiffs-Appellants

v.

REPUBLIC OF POLAND and MINISTRY OF THE TREASURY OF POLAND (MINISTERSTWO SKARBU PANSTWA)

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES

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SUMMARY

Plaintiffs are Polish Jews and their descendants who claim that the Republic of Poland and its Ministry of the Treasury expropriated plaintiffs' property as part of a policy following world War II to drive Jewish survivors of the Holocaust from Poland. *See Garb* v. *Republic of Poland*, 207 F. Supp. 2d 16, 19 (E.D.N.Y. 2002). Under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, foreign states are generally immune from suit in U.S. courts. *See id.* § 1604. Plaintiffs contend that the district court had jurisdiction in this case pursuant to two exceptions to the FSIA's general rule of immunity: the commercial activity exception, *id.* § 1605 (a) (2), and the exception for expropriations committed in violation of international law, id. § 1605(a)(3). The district court properly concluded that the expropriation exception cannot be applied retroactively and that jurisdiction over plaintiffs' expropriation claims cannot be founded on the commercial activities exception.

At the time of the expropriations here at issue, which plaintiffs contend were effected in the 1940s and '50s, *see id.* at 30, foreign states were accorded immunity from suit in American courts on claims relating to their sovereign acts, including expropriations. The United States did not recognize an exception to the general rule of foreign state immunity for expropriation claims until 1976, when Congress enacted the FSIA. This Court has previously held, and subsequent Supreme Court decisions reaffirm, that exceptions to sovereign immunity do not apply retroactively to reach conduct that would have been accorded immunity when it occurred.

In *Carl Marks & Co., Inc.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988), this Court held that the "commercial activity" exception to the FSIA does not apply retroactively to conduct that took place prior to the State Department's adoption of the "restrictive theory" of

immunity in 1952. *Id.* at 27. The correctness of the Court's retroactivity analysis in that decision has been confirmed by subsequent Supreme Court decisions. The elimination of a defense to liability is a substantive change in the law that is subject to a presumption against retroactive application. The FSIA contains no clear statement of Congressional intent to override that presumption.

The rationale of *Carl Marks* compels the conclusion that the FSIA's expropriation exception does not apply to conduct pre-dating the statute's enactment in 1976. Under the restrictive theory of immunity, which the United States followed from 1952 until the FSIA's adoption, foreign sovereigns retained their immunity from suit arising out of the expropriation of property. *See Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971). Plaintiffs cannot circumvent the rule against retroactive application of the FSIA's expropriation exception by attempting to assert their takings claims under the commercial activity exception.

Contrary to plaintiffs' arguments, the United States did not have a policy to deny foreign states immunity with respect to sovereign acts that the United States found reprehensible. Nor has Congress authorized the courts to deny immunity on a case-by-case basis, or selectively to apply the FSIA's exceptions retroactively, on such grounds. Indeed, this Court has already rejected such a role for the courts. *See Smith*, v. *Socialist People's Libyan Arab Jamahiriva*, 101 F.3d 239 (2d Cir. 1996).

ARGUMENT

BECAUSE POLAND WOULD HAVE BEEN ACCORDED IMMUNITY ON PLAINTIFFS' CLAIMS AT THE TIME OF THE CHALLENGED CONDUCT, THE FSIA DOES NOT RETROACTIVELY SUPPLY A BASIS FOR EXERCISING JURISDICTION OVER THOSE CLAIMS.

A. History Of The United States' Sovereign Immunity Practice.

This Court described the history of the United States' foreign sovereign immunity practice in *Carl Marks*. As the Court recognized, prior to 1952, foreign governments had a "settled expectation, rising to the level of an antecedent right, of immunity from suit in American courts." 841 F.2d at 27. From *The Schooner Exchange* v. *M'Fadden*, 11 U.S. (7 Cranch) 116 (1812), until 1952, the United States adhered to the "absolute theory of sovereign immunity," pursuant to which "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 711 (1976) (reprinting Letter of Acting Legal Adviser Jack B. Tate ("Tate Letter"). *See also Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) .

This policy changed when "the State Department issued the 'Tate Letter' in 1952, adopting the 'restrictive theory' of sovereign immunity." *Carl Marks*, 841 F.2d at 27. *See also Alfred Dunhill*, 425 U.S. at 711 (reprinting Tate Letter). In that letter, the State Department announced that henceforth it would recommend to United States courts that foreign states be granted immunity only for their sovereign or public acts, and not for their commercial acts. *See Verlinden*, 461 U.S. at 486-87; *Carl Marks*, 841 F.2d at 27. As explained in the Tate letter, the State Department's adoption of the restrictive theory reflected an increasing acceptance of that theory by

foreign states, as well as the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." *Alfred, Dunhill*, 425 U.S. at 714 (reprinting Tate Letter).[1]

Foreign sovereign immunity practice entered its third (and current) phase when Congress enacted the FSIA, which became effective in January, 1977. Pub. L. No. 94-583, 90 Stat. 2891 (1976) *codified at* 28 U.S.C. §§ 1330, 1602, *et seq.* The FSIA contains a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or

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[1] Plaintiffs contend that the United States courts had adopted a restrictive theory of immunity even prior to 1952. *See* Appellants' Br. at 21-25. However, the few cases plaintiffs cite do not support that conclusion. These cases illustrate instances in which a purely commercial corporate enterprise or vessel used for commercial purposes by an entity other than the sovereign was not recognized as being part of the foreign sovereign, although the foreign state had an ownership interest in it. *See The Uxmal*, 40 F. Supp. 258, 261 (D. Mass. 1941) (Mexico's sovereign immunity "does not extend to property of the Association," which was "a corporate entity" "like any corporation") ; *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 201-02 (S.D.N.Y. 1929) (while noting that "[t]he person of the foreign sovereign and those who represent him are immune, whether their acts are commercial, tortious, criminal, or not, no matter where performed," such immunity did not extend to the defendant corporation, which was "organized, like any other business corporation, under the general corporation laws of France"); *Coale* v. *Societe Co-Operative Suisse Des Charbons, Basle*, 21 F.2d 180, 181 (S.D.N.Y. 1921) (holding that Societe "as a corporate entity, was liable for its corporate obligations," while noting that "the case might have been different" if Societe had acted as agent of the Swiss government). These cases have no relevance here, where plaintiffs sue the Republic of Poland itself and its Treasury Ministry. In any event, the result in this case does not turn on when the restrictive theory was recognized by the United States, because, as we discuss below, immunity would have been accorded to sovereign acts such as expropriations even under the restrictive theory.

instrumentalities." *Verlinden*, 461 U.S. at 488. The FSIA sets forth a general rule that foreign states are immune from suit in American courts. 28 U.S.C. § 1604. Courts may exercise jurisdiction over foreign states *only* if the suit comes within one of the specific, exceptions to that rule established by Congress. *See id.* §§ 1605-07.

By adopting a statute to govern comprehensively the question of foreign sovereign immunity, Congress intended to relieve the State Department of the diplomatic pressures associated with case-by-case decisions and to establish legal principles to guide the courts. *See Verlinden*, 461 U.S. at 488. The FSIA now "'provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.'" *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993).

B. As This Court Has Previously Held, An FSIA Exception To Immunity Cannot Be Applied Retroactively To Conduct That Pre-Dates The Exception's Recognition By The United States.

In *Carl Marks*, the Court held that the FSIA's commercial activity exception does not apply retroactively to claims that arose prior to the 1952 Tate Letter. The Court recognized that "only after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions." *Carl Marks*, 841 F.2d at 27 (citation omitted). Thus, to apply the FSIA's commercial activity exception to pre-1952 conduct "would affect adversely [foreign governments'] settled expectation, rising 'to the level of an antecedent right,' of immunity from suit in American courts." *Ibid. See also Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986) ("to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns").

Although plaintiffs question the continued vitality of *Carl, Marks*, *see* Appellants' Br. at 30-31, subsequent Supreme

Court decisions underscore its correctness. Since *Carl Marks*, the Supreme Court has confirmed that a change in the law that "eliminates a defense to * * * suit" affects "the substance" of the parties' rights and will not apply to conduct that predates the change, unless Congress explicitly provides to the contrary. *Hughes Aircraft Co.* v. *United States*, 520 U.S. 939, 948 (1997). *Hughes* concerned an amendment to the False Claims Act that allowed a *qui tam* relator to bring a claim that previously could only be brought by the United States. The Supreme Court held that a statute allowing the courts to exercise jurisdiction over a private claim that could previously only have been brought by the government affects substantive rights and "is as much subject to our presumption against retroactivity as any other." *Id.* at 951. *Hughes* therefore reaffirms what the Supreme Court had previously held in *Verlinden*, that the defense of foreign sovereign immunity is a matter of "substantive federal law." 461 U.S. at 493 (emphasis added)).

Plaintiffs cite to *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), as raising doubt as to the correctness of *Carl Marks's* holding, *see* Appellants' Br. at 30-31, a reading that is precluded by *Hughes*. Prior to the Supreme Court's decision in *Hughes*, some courts (including the Ninth Circuit in the *Hughes* case itself) had construed *Landgraf* as creating a presumption in favor of applying jurisdictional statues retroactively. *See, e.g., United States ex rel. Schumer* v. *Hughes Aircraft Co.*, 63 F.3d 1512, 1517 (9th Cir. 1995). In *Hughes*, however, the Supreme Court specifically rejected that misinterpretation of *Landgraf*. *See Hughes*, 520 U.S. at 950-51. The Supreme Court held that a new jurisdictional provision that affects substantive rights is "subject to our presumption *against* retroactivity." *Id.* at 951 (emphasis added). Absent a clear congressional statement to the contrary, the courts will presume that Congress did not intend to create jurisdiction over claims that would not have been heard at the time they arose.. *See Immigration and*

Naturalization Service v. *St. Cyr*, 121 S. Ct. 2271, 2288-89 (2001) (statutes "will not be construed to have retroactive effect unless their language requires this result").

The Supreme Court has also clarified how the presumption against retroactivity applies to a statute in which some provisions do not affect substantive rights while others do. In such a case, the Court held, the retroactivity analysis must be undertaken on a provision-by-provision basis. Thus, in *St. Cyr*, the Court analyzed the question of retroactivity separately for each provision of the Antiterrorism and Effective Death Penalty Act, concluding that some provisions of the statute would present no retroactivity problem while other provisions, which affected substantive rights, were subject to a presumption against retroactive application. *See id.* at 2289.

The Supreme Court's *Hughes* and *St. Cyr* decisions confirm the approach adopted by this Court in *Carl Marks*. Under *Hughes* and *St. Cyr*, some provisions of the FSIA—such as the service of process and removal provisions—are purely procedural and presumptively apply to all litigation filed subsequent to the FSIA's effective date. Notably, the district court in *Carl Marks* assumed the applicability of these provisions to the litigation, even though it held that the commercial activity exception was not available on plaintiffs' pre-1952 claims. *See Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 665 F. Supp. 323, 328-31 (S.D.N.Y. 1987) (discussing effectuation of service under 28 U.S.C. § 1608). Similarly, the FSIA's exceptions to immunity regarding waiver and counterclaims, 28 U.S.C. §§ 1605(a)(1), 1607, which codified common-law exceptions that had existed even before the Tate letter, *see, eg., Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); *Guaranty Trust Co. of New York*, v. *United States*, 304 U.S. 126, 134-35 (1938), would apply regardless of when the claims arose, *see Carl Marks*, 841 F.2d at 27 (indicating that the district court could

have exercised jurisdiction over pre-1952 conduct under a theory of waiver if plaintiffs had been able to show that the USSR had "consented to suit").

In contrast, the presumption against retroactivity precludes application of the FSIA's other exceptions in such a way as to "eliminate[] a defense to * * * suit" that existed at the time of the challenged conduct. *Hughes*, 520 U.S. at 948. Thus, the commercial activity exception, § 1605 (a) (2), does not apply to a foreign state's commercial conduct that pre-dated the Tate Letter, *Carl Marks*, 841 F.2d at 27, but it does apply, as the Court suggested, to conduct after the Tate Letter because "after 1952 * * * it [was] reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transaction," *ibid. See also Republic of Argentina* v. *Weltover*, 504 U.S. 607, 613-14 (1992) (noting that commercial activity exception essentially codifies restrictive theory of immunity as described in *Alfred Dunhill*).

Neither the language nor history of the FSIA contain the "clear indication," *St. Cyr*, at 2271, 2288-89, that would be required to overcome the presumption against retroactively applying provisions that eliminated the defense of sovereign immunity. *See Carl Marks*, 665 F. Supp. at 336. In one reference to timing, Congress delayed the effective date of the FSIA for ninety days after its enactment with the stated purpose of giving advance notice to foreign nations of the changes worked by the statute in the United States' law concerning foreign sovereign immunity. Pub. L. No. 94-583, § 8, 90 Stat. 2898 (1976); *see* H.R. Rep. No. 94-1487 *reprinted in* 1976 USCCAN 6604, 6632 (90-day period "necessary in order to give adequate notice of the act and its detailed provisions to all foreign states"). This delay is, at the least, entirely consistent with an intent not to upset settled expectations. Congress's only other reference to timing was a statement in its findings that the "[c]laims of foreign states to immunity *should henceforth* be decided by courts of the

United States and of the States in conformity with the principles set forth [in the FSIA]. "28 U.S.C. § 1602 (emphasis added). This statement lacks sufficient clarity to overcome the presumption against retroactivity that applies to certain FSIA exceptions. Indeed, the Eleventh Circuit in *Jackson* v. *People's Republic of China*, stated that this language "appeared to be prospective" only and counseled *against* retroactive application. 794 F.2d at 1497.

More fundamentally, the point of the statutory statement is that questions of immunity would "henceforth be decided *courts*," 28 U.S.C. § 1602 (emphasis added), rather than by the executive branch and based on legal principles rather than foreign policy considerations. *See* H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606 ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process."). This general statement of purpose manifests no intent to deny immunity that would have been recognized for past sovereign conduct. *See St. Cyr*, 121 S. Ct. at 2288-89.

C. Under The Reasoning Of *Carl Marks*, The FSIA's Expropriation Exception Cannot Be Applied To Pre-FSIA Conduct.

As the district court correctly held, the Court's reasoning in *Carl Marks* compels the conclusion that the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), does not apply retroactively to expropriations effected by Poland during the 1940's and 50's. *See Garb* v. *Republic of Poland*, 207 F. Supp. 2d 16, 27 (E.D.N.Y. 2002) (to the extent

§ 1605(a)(3) "overruled prior law, the holding in *Carl Marks* makes clear that it cannot be applied retroactively").[2]

As discussed, prior to 1952, United States policy, as described in the Tate Letter, adhered to the "absolute theory of sovereign immunity," under which "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Alfred Dunhill*, 425 U.S. at 711 (reprinting Tate Letter). *See also Verlinden*, 461 U.S. at 486. Thus, application of the FSIA's expropriation exception to expropriations pre-dating 1952 would have the same substantive effect on settled rights as would retroactive application of the commercial activity exception to pre-1952 conduct.

Foreign states continued to be accorded immunity as to expropriation claims under the restrictive theory of immunity announced in the Tate Letter. In *Victory Transport Inc* v. *Comisaria General de Abastecimientos y Transporter*, 336 F.2d 354 (2d Cir. 1964), this Court held that even under the restrictive theory foreign sovereigns enjoyed immunity with respect to suits challenging "strictly political or public acts about which sovereigns have traditionally been quite sensitive," including "internal administrative acts" and "legislative acts, *such as, nationalization.*" *Id.* at 360 (emphasis added).

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[2] The expropriation exception provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
>
> > (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

U.S.C. § 1605(a) (3).

See also Isbrandtsen Tankers, Inc. v. *President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971) (quoting same) ; *Zwack* v. *Kraus Bros.*, 237 F.2d 255, 259 (2d Cir. 1956) (noting that Hungary was immune from suit for uncompensated expropriation).

The expropriation exception constituted a substantive change in the United States' practice concerning foreign sovereign immunity when it was adopted as part of the FSIA, and, as *Carl, Marks* makes clear, it therefore cannot apply to any conduct pre-dating the FSIA.

Plaintiffs seek to avoid the bar of non-retroactivity by recasting their expropriation claims under the commercial activity exception. But expropriation of property by a foreign government by sovereign act is not the type of "commercial activity" that Congress intended to fall within that exception to the FSIA. The Supreme Court has held that the FSIA's "commercial activity" should be construed in accordance with the description the Supreme Court plurality gave of the restrictive theory in *Alfred Dunhill*. *See Weltover*, 504 U.S. at 613-14. Significantly, the *Alfred Dunhill* plurality's discussion of the restrictive theory specifically cited this Court's decision in *Victory Transport*. *See Alfred Dunhill*, 425 U.S. at 703; *Republic of Argentina*, 504 U.S. at 613 (noting same). Indeed, the Supreme Court continues to rely on *Victory Transport* for guidance as to how the restrictive theory was applied prior to the FSIA. *See Saudi Arabia* v. *Nelson*, 507 U.S. 349, 361 (1993). As noted above, *Victory Transport* makes clear that under the restrictive theory foreign sovereigns retained immunity as to the expropriation of property. *Victory Transport*, 336 F.2d at 360. Plaintiffs' claims clearly relate to the actual expropriation of their property, not Poland's subsequent commercial use of it. Therefore, "[p]laintiff s cannot escape" the expropriation exception's non-retroactivity "through artful recharacterization of their takings claim." *Garb*, 207 F. Supp. 2d at 31-32.

D. The Court May Not Deny Poland Immunity Solely On The Basis Of The Reprehensible Nature Of The Conduct Alleged By Plaintiffs.

Plaintiffs urge the Court to adopt the reasoning of the Ninth Circuit's recent decision in *Altmann* v. *Austria*, 2002 WL 31770999 (9th Cir. Dec. 12, 2002), which held that the Republic of Austria *could* be sued under the FSIA for its conduct during the Nazi era. That decision, however, is flawed in numerous respects, and is inconsistent with this Court's precedent.[3] In enacting the FSIA, Congress has not empowered the Courts to deny immunity to foreign states in a case-by-case fashion on the basis of the outrageous nature of the foreign government's conduct.

The Ninth Circuit's *Altmann* decision rests upon a mistaken belief that the Executive Branch had adopted a policy after the war to deny foreign governments immunity with respect to their heinous conduct, especially with respect to Jewish minorities. The Ninth Circuit's opinion rests largely on a second letter by Acting Legal Adviser Tate, the so-called "*Bernstein* Letter," submitted to this Court in *Bernstein* v. *N.V. Nederlandshe-Amerikaansche*, 210 F.2d 375, 376 (2d Cir. 1954) ("*Bernstein II*"). The *Bernstein* Letter stated that the State Department's policy was "to relieve American courts of any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." April 13, 1949 letter of Jack B. Tate, *reprinted in Bernstein II*, 210 F.2d at 376. The *Bernstein* Letter did not, however, address the doctrine of foreign sovereign immunity. Rather it concerned the act of state doctrine, *i.e.*, a court's ability to pass on the validity of a foreign government's acts in a case that is properly within its jurisdiction.

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[3] The United States has filed a brief in *Altmann* urging the Ninth Circuit to rehear the case.

In *Bernstein*, the plaintiff sued to recover commercial property that the Nazis had confiscated from him without compensation. *See Bernstein* v. *N.V. Nederlandshe-Amerikaansche*, 173 F.2d 71, 72 (2d Cir. 1949) ("*Bernstein I*"). Significantly, however, the defendant in *Bernstein* was not a foreign government, but a Dutch corporation. *Ibid.* This Court had initially applied the act of state doctrine, pursuant to which it refused to "pass on the validity of acts of officials of the German government." *Bernstein II*, 210 F.2d at 375. The *Bernstein* Letter addressed solely that issue. The *Bernstein*, Letter does not speak to the susceptibility of the German government to suit in our courts, but instead concerns only the courts' "jurisdiction to *pass upon the validity of the acts of Nazi officials*." *Bernstein II*, 210 F.2d at 376 (reprinting letter) (emphasis supplied). *See also* Nov. 26, 1975 Letter of Legal Adviser Monroe Leigh to the Solicitor General (characterizing *Bernstein*, Letter as "advis[ing] that the *act of state doctrine* need not apply to a class of cases involving Nazi confiscations" (emphasis added)), *reprinted in Alfred Dunhill*, 425 U.S. at 706, 708.

The Supreme Court has recognized that "[t]he act of state doctrine, . . . although it shares with the immunity doctrine a respect for foreign states," is distinct from it. *Banco Nacional, de Cuba* v. *Sabbatino*, 376 U.S. 398, 438 (1964) (applying act of state. doctrine, though foreign government instrumentality had waived immunity by invoking the court's jurisdiction). *See also Empresa Cubana Exportadora de Azucar y sus Derivados* v. *Lamborn* & Co., 652 F.2d 231, 238 (2d Cir. 1981) (*Sabbatino* "reflects a clear differentiation between the concept of and reason for sovereign immunity, on the one hand, and the act of state doctrine, on the other"). This Court had, in fact, recognized the significance of this distinction even at the time of the *Bernstein* and Tate letters. In *Zwack*, v. *Kraus Bros.*, plaintiff sued to stop an American company from using a trade name that the Hungarian government had expropriated. The defendant sought to have the suit dismissed

both on act of state grounds and for plaintiff's failure to join Hungary as an indispensable party. With respect to the act of state doctrine, the Court declined to recognize the validity of Hungary's uncompensated expropriation, citing the United States' policy declared in *Bernstein II*. *See Zwack*, 237 F.2d at 260-61. At the same time, however, the Court recognized that the Hungarian government itself was "not subject to the jurisdiction of the court below unless its should voluntarily appear." *Id.* at 259.

In light of the sensitive nature of the sovereign immunity doctrine in our foreign affairs, the courts should not infer an abrogation of foreign states' immunity from a document that does not specifically refer to a foreign government's susceptibility to suit in U.S. courts. *See Argentine Republic* v. *Amerada Hess Shipping*, 488 U.S. 428, 442 (1989) (holding that even a treaty "stat[ing] that compensation shall be paid for certain wrongs" by a foreign government does not imply an abrogation of immunity from private suit).[4] The Ninth Circuit's extension of the *Bernstein* Letter policy from the act of state context to the field of sovereign immunity is especially untenable in light of the author's own implicit rejection of such an interpretation. The *Bernstein* Letter was authored by the same person who wrote the Tate Letter only three years later. The Ninth Circuit's reading creates a conflict between the two letters that did not exist and has never been thought to exist.

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[4] The Treaty between the Allied and Associated Powers and Poland (Protection of Minorities) (June 28, 1919), *reprinted in* 1 International Legislation, 1919-1921 (Manley O. Hudson ed., 1931), upon which plaintiffs also rely, *see* Appellants' Br. at 4-5, 35-36, is likewise inapposite, as it does not contain any reference to Poland being subject to suit by private parties in the courts of other nations. To the contrary, the enforcement mechanisms provided in the treaty were enforcement by the League of Nations or suit brought by another government before the Permanent Court of International Justice. *See id.* at Art. 12.

Plaintiffs' and the Ninth Circuit's further reliance on the fact that certain of those responsible for Nazi atrocities were prosecuted criminally at Nuremberg, *see Altmann*, 2002 WL 31770999, at *9, Appellants' Br. at 37-40, is also misplaced. The fact that individual Nazi officials could be criminally prosecuted in an international tribunal does not in any way suggest that foreign governments were subject to suit by private plaintiffs in American courts. Indeed, individual officials are frequently subject to suit in circumstances where the sovereign retains its immunity. *See, e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 757 (1999).[5]

In essence, plaintiffs ask the Court to hold that during the pre-FSIA era a foreign state would have been denied immunity in U.S. courts based solely upon the shocking nature of its conduct. We are aware of no pre-FSIA cases in which a court asserted jurisdiction over a foreign government based upon such a theory. Nor had the Executive Branch

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[5] The Ninth Circuit also mistakenly relied on the fact that Austria had adopted the restrictive theory of immunity in the 1920s. *Cf. Altmann*, 2002 WL 31770999, at *8. The court did not cite any instance in which a foreign sovereign was denied immunity because it applied the restrictive theory of immunity in its own courts, and we are aware of none. Indeed, although, according to the Tate Letter, Peru was one of the countries that had previously accepted the restrictive theory of immunity, *see Alfred Dunhill*, 425 U.S. at 713, the United States certified, in 1942, the immunity of a Peruvian commercial vessel, *see Ex Parte Peru*, 318 U.S. at 579-81. The Ninth Circuit's analysis makes a foreign government's susceptibility to suit turn on "the defendant country's acceptance of the restrictive principle of sovereign immunity." *Altmann*, 2002 WL 31770999, at *9 (indicating that Russia, China, and Mexico, which had not accepted the restrictive theory, would be immune from suit for conduct during the pre-1952 era). But, one of Congress's purposes in adopting the FSIA was to ensure a more uniform application of sovereign immunity principles. *See* H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606. It would not have wanted application of the FSIA to vary among countries, especially since the Executive Branch had never previously established such a rule.

adopted any such blanket exception. In the absence of precedent or a definitive statement of the Executive Branch creating such an exception, the courts during the period when plaintiffs' claims arose would not have created such an exception on their own. *See Hoffman*, 324 U.S. at 34-35 (in the absence of a specific recommendation from the Executive, courts must decide question of immunity "in conformity with the principles accepted by the department of the government charged with the conduct of our foreign relations").

Nor is there any indication that when Congress enacted the FSIA, and gave to the courts the responsibility to decide issues of immunity, Congress intended the courts to interject themselves into the arena of foreign policy by deciding, on a case-by-case basis, to deny a generally-available immunity to particular countries on the basis of their heinous conduct. To the contrary, this Court and several others have specifically rejected such a role for the courts. *See Smith* v. *Socialist, People's Libyan Arab Jamahiriya*, 101 F.3d 239, 244 (2d Cir. 1997) ; *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1174-1175, n.1 (D.C. Cir. 1994); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 718-19 (9th Cir. 1992). Such an approach is, moreover, contrary to one of Congress's chief purposes in adopting the FSIA: to ensure a more uniform application of sovereign immunity principles. See H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606.

Indeed, plaintiffs' argument, if adopted, would create the anomaly of imputing to the pre-FSIA period an exception to immunity that does not exist under the FSIA. *See* 28 U.S.C. § 1604 ("a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607"); *Smith*, 101 F.3d at 244 (refusing to infer a waiver of immunity from Libya's role in the bombing of Pan Am Flight 103); *Princz*, 26 F.3d at 1171-75 (Germany's conduct during World War II immune under

FSIA). Had an exception for heinous conduct existed prior to the FSIA, such an exception would presumably have continued to be recognized when Congress, in enacting the FSIA, further narrowed the scope of immunity. Thus, the absence of such an exception today is strong evidence that no such exception existed previously.

CONCLUSION

For the reasons above, the Court should affirm the district court's judgment dismissing plaintiffs' claims against the Republic of Poland for lack of jurisdiction.

Respectfully submitted,

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February 4, 2003

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a) (7) (C) that the foregoing Brief for the United States as Amicus Curiae is monospaced, has 10.5 or fewer characters per inch and contains 5,136 words, according to the count of Corel Wordperfect 9.

/s/ Douglas Hallward-Driemeier
Douglas Hallward-Driemeier

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2003, I caused to be dispatched the original and nine (9) copies of the foregoing Brief for Amicus Curiae the United States of America in Support of Defendants-Appellees to the Clerk of this Court by Federal Express. On the same date, I served two copies of the brief on the following counsel by Federal Express:

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APPENDIX E

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May 2, 2003

VIA FEDERAL EXPRESS

Roseann B. MacKechnie, Clerk of Court
Second Circuit Court of Appeals
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Whiteman* v. *Republic of Austria*, 02-9361(L);
Garb v. *Republic of Poland*, 02-7844

Dear Ms. MacKechnie:

Amicus curiae the United States of America respectfully submits this letter-brief in response to the request of the Court (Cabranes, Kearse, Straub, JJ.) at oral argument of the above-referenced matters on April 15, 2003, that the United States file a supplemental letter addressing certain issues.

1 Effect of the United States' 1960 Claims Settlement Agreement with Poland on Plaintiffs' Claims in the Garb Litigation.

In 1960, the United States and Poland entered into an agreement to settle the *claims* of United States nationals relating to property that had been nationalized by the Polish government. Agreement Between the Government of the United States of America and the Government of the Polish People's Republic Regarding Claims of Nationals of the United States (July 16, 1960) ("Agreement"), 11 U.S.T. 1953. The Agreement constitutes a "full settlement and discharge of all claims of nationals of the United States * * * against *the Government of Poland* on account of the nationalization and

other taking by Poland of property * * * which occurred on or before the entry into force of this Agreement." *Id.* at Art. I.A.

By the Agreement's terms, the United States espoused only the "claims of nationals of the United States," a phrase which is defined in. an Annex to the Agreement as encompassing "rights" * * which, from the date of such nationalization, appropriation or other taking to the date of entry into force of this Agreement, have been continuously owned" by United States nationals. *Id.* Annex, ¶ A.[1] Thus, a claim relating to property that was not owned at the time of the taking by a United States national was not settled by the Agreement, and the owner would not have been entitled to compensation. *See, e.g., Claim of Edward Krukowski,* Claim No. PO-9532, Dec. No. PO-927 (1964), *reprinted in* FCSC Dec. & Ann. 459 (1968) (denying claim of individual who became a naturalized citizen of the United States subsequent to the date of loss as determined by the commission).

With respect to any claim within the scope of the Agreement, its effect is to extinguish the individual's claim against Poland. As the Supreme Court has recognized, "international agreements settling claims by nationals of one state against the government of another 'are established international practice reflecting traditional international theory.'" *Dames Moore* v. *Regan,,* 453 U.S. 654, 679-80 (1981). "Once it has espoused a claim, a sovereign has wide-ranging discretion in disposing of it. It may compromise it, seek to enforce it, or

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[1] The Annex further specifies the types of ownership interests that satisfy this requirement. With respect to the question of who qualified as "nationals of the United States," the Foreign Claims Settlement Commission utilized the definition of. the term provided in the Commission's jurisdictional statute, sec. 2(c), Title I, International Claims Settlement Act of 1949. Under that definition, the term "nationals of the United States" includes "persons who are citizens of the United States" and those "who, though not citizens of the United States, owe permanent allegiance to the United States." *Id.*

waive it entirely. "*Asociasion de Reclamamtes*, v. *United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir.1984)), *cert, denied*, 470 U.S. 1051 (1985). *See also Ozanic* v. *United States*, 188 F.2d 228, 231 (2d Cir. 1951) ("the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilised nations"). Here, the language of the Agreement makes clear that the individual claims within its scope have been fully settled and discharged. *See* Agreement, 11 U.S.T. I953, Art. 1.A. (stating that the $40 million paid by Poland was accepted as "full settlement and discharge of all *claims of nationals* of the United States * * * against the Government of Poland" relating to taken property).

While the Agreement does not address claims regarding property owned by non-US. nationals, its silence on the question of non-nationals' claims should not be construed as an indication that the parties expected litigation of such claims to take place in U.S. courts: As our principal a amicus brief discussed, at the time of the 1960 Agreement, Poland would have been immune from suit on such claims. *See Victory Transmit Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964) (under restrictive theory, sovereigns retained immunity from claims relating to expropriation of property). Thus, the only recourse for individuals whose property had been taken by Poland was espousal of their claims. Because, under customary international practice, states only espouse claims relating to wrongs done to their own citizens, *see, e.g., Panevezys-Saldutiskis Railway*, 1939 P.C.I.J. (ser. A/B) no. 76 at 16, the United States and Poland would have exported the 1960 Agreement to have fully resolved any legal issue between them relating to Poland's expropriations. *See* Agreement, 11 U.S.T. 1953, Art. IV ("the Government of the United States will neither present to the Government of Poland nor espouse claims of nationals of the United States

against the Government of Poland" relating to the subject of the Agreement).

2. The United States' Position from 1938 through 1943 With Respect to Germany's Claimed Annexation of Austria

As the United States explained in its reply brief, "[m]ilitary occupation, whether during war or after an armistice, does not terminate statehood." Restatement of the Law (Third): The Foreign Relations Law of the United States (1986), § 201, Reporters' Notes 3 (giving example of German occupation of Europe during World War . *See also ibid.* ("[a]n entity's statehood" is not terminated by annexation "where annexation is in violation of the United Nations Charter"). The United States did not give *de jure* recognition to Germany's 1938 annexation of Austria under threat of force. To the contrary, the 1943 Moscow Declaration, which is the definitive statement of United States policy regarding Germany's claimed annexation of Austria in 1938, specifically refused to give it such recognition. In that declaration, President Roosevelt, together with the British, Prime Minister and Russian Premier, jointly declared that the Allies regarded "the annexation imposed upon Austria by Germany on March 15th, 1938, as null and void." IX Department of State Bulletin, 310 (November 6, 1943).

At oral argument, the Court asked the United States to submit a supplemental filing focusing specifically on the United States' policy toward Austria's annexation during the period from 1938 until the Moscow Declaration. As we discuss below, the record during that period reflects that the United States took numerous practical steps to respond to the reality of Germany's occupation of Austria, but there was not a definitive recognition by the United States that Austria had become a *de jure* part of Germany.

The United States' immediate response to the Anschluss indicated that the United States was not giving legal recognition to Austria's annexation, but merely taking steps to respond to the *de facto* situation of German control. On April 6, 1938, the United States informed Germany that "the United States finds itself under the necessity *as a practical measure*, of closing its Legation at Vienna." XVIII Department of State Press Releases 465 (1938) (emphasis added). Similarly, in pressing Germany to assume payments on Austria's debt to the United States, the U.S. stated that it was "under the necessity *for all practical purposes* of accepting what [the Austrian Minister] says *as a fact*." *Id.* at 466 (emphasis added).

On numerous occasions prior to the Moscow Declaration, President Roosevelt refused to recognize the legitimacy of Germany's annexation of Austria. In a June 1941 Executive Order freezing certain foreign-owned property, the President listed Austria as a distinct "foreign country" from Germany. *See* Herbert Wright, Attitude of the United States Toward Austria, 78th Cong., 2d Sess., House Doc. 477, 19-20 (1944) (quoting Executive Order 8785). Likewise, in public addresses, the President characterized Austria as having been occupied by force, in the same manner as other countries whose annexation the United States did not recognize. See, *e.g.*, IV Department of State Bulletin, 650. (May 27, 1941, radio address, listing "Austrians" together with "Czechs, Poles, Norwegians, Dutch, Belgians, Frenchmen, Greeks, Southern Slavs" as "silenced peoples"); V Department of State Bulletin, 477 (Dec. 9,1941,radio address, listing German occupation of Austria together with other Axis occupations that the United States had refused to recognize). Thus, President Roosevelt's declaration at Moscow that the Anschluss was "null and void" was entirely consistent with his view that the annexation of Austria had been achieved by force and was not to be legitimized.

While it is true that, after the Anschluss, the United States declined to apply certain treaty arrangements with Austria, these were practical steps that prevented Germany from taking advantage of its illegal occupation of Austria: Thus, for example, Austria's preferential trade status and the Treaty of Friendship and Commerce were suspended after the claimed annexation. *See, e.g.*, II Foreign Relations of the United States 1938 (printed 1955) 503-05 (noting Presidential order suspending Austria's preferential trade relationship). But such a step does not imply, *de jure* recognition of Austria's annexation. *See id.* at 504-05 (deletion of Austria from list of favored trade partners was made in relation to policy that "for all .practical purposes the. disappearance of the Republic of Austria * * * must be accepted as a fact"). Notably; the United States took similar steps with respect to other Germany-occupied countries as well, while refusing to admit Germany's *de jure* acquisition of the territory. *See, eg.*, XX Department of State Press Releases 200 (March 17,1939) (order that goods from Czechoslovakia be treated as products from Germany for purposes of tariffs).[2]

The State Departments efforts to force Germany to assume responsibility for Austria's public debt must be viewed in a similar fashion. Although the State Department appealed to the rule of international law that "fin case of absorption of a state, the substituted sovereignty assumes the debts and obligations of the absorbed state, and takes the burdens with the benefits," XVIII Department of State Press Releases, 695

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[2] The United States also combined the quotas of Austria and Germany, for immigration purposes. *See* Executive Proclamation 2283 (April 28,1938), 8 Fed. Reg. 997, *discussed in* Robert Larger, Seizure of Territory: The Stimson Doctrine and Related Principles in Legal Theory and Diplomatic Practice 165-66 (1947). The practical effect of this step was to allow Austrian refugees from Nazi oppression to apply for immigration slots previously reserved for Germans, and the proclamation specifically stated that it was "not to be regarded as having any significance extraneous to this object." *See ibid.*

(1938), this was merely a way of ,forcing Germany to accept the consequences of its own view of the situation, and does not necessarily imply a *de jure* recognition by the United States of Austria's annexation, XVIII Department of State Press Releases, 466-67 (noting with respect to public debt issue the practical fact that "German authorities * * * have succeeded in control of the means and machinery of payment in Austria").

The government's treatment of Austrians for purposes of i emigration laws and other laws relating to nationality also reflects a practical attempt to reconcile the position that Austria had not legally been annexed by Germany with the practical fact that Austria's wealth was subject to control by Germany and many Austrians were quite supportive of Germany. The Department of Justice's regulations allowed Austrians to list their nationality as "Austrian" in the same way that other peoples whose countries had been occupied by Germany could do. *See* Robert Langer, Seizure of Territory: The Stimson Doctrine and Related Principles in Legal Theory and Diplomatic Practice 168 (1947). Yet, the Department viewed certain Austrians in the United States as having allegiance to Germany and of posing a threat to national security in the midst of world war II. Thus, the Department argued in several cases that for purposes of domestic U.S. law Austrians should be regarded as coming within the statutory definition of enemy aliens. In so urging, the government expressly premised its argument on the State Department's position that "Austria is *de facto* a part of Germany" and the fact that Austrians had been accorded German citizenship pursuant to domestic German law. S Brief for Respondent-Appellee in *United States ex rel. Schwartzkopf* v. *Uhl*, 15. The government carefully avoided, however, any assertion that the United States recognized Austria as being *de jure* a part of Germany. *See id.* at 19 ("The Government does not contend that Germany, is *de jure* the sovereign of the territory of Austria").

The historical record does contain a 1939 letter from the Secretary of State to the Attorney General in connection with a district court case concerning the sequestration of assets, which stated that "the United States recognizes that Austria has ceased to exist as an independent sovereign State and has been incorporated in the German Reich, and that Germany exercises *de jure* sovereignty over the territory of the former Republic of Austria," *see* Marjorie M. Whiteman, 2 Digest of International Law 328 (1963) (hereinafter "2 Whiteman") (quoting March 2, 1942 memorandum of Ralph Snowden Hill, quoting letter of Secretary of State Hull dated May 27, 1939). We have not yet been able to locate the district court files in the case to which Secretary Hull's letter related in order to determine with certainty whether the government's filing in that case contained a statement to similar effect.. However, even, assuming that it was, that fact would not, in light of all the contrary evidence during the period, be a sufficient basis upon which to conclude that the United States had given official *de jure* recognition to Austria's annexation or conveyed that view to the Austrian community. Notably, the memorandum referring to the Secretary's 1939 letter points to no public statement by the United States to that effect.

Indeed, when, in 1942, the Secretary of State was asked to clarify publicly the United States' position with respect to Austria's status, he responded that the United States' various steps with respect to Austria had been taken purely as practical responses to the *de facto* circumstance of effective German control, and did not signify *de jure* recognition of the Anschluss.. Secretary Hull stated:

> It is probable that such confusion [about the official U.S. position regarding Austria's status], if it exists, has arisen from administrative steps which may have been taken by this Government in pursuance of its own laws designed to afford adequate protections to this country's

> interests in dealing with the situation presented by the imposition of military control over Austria and residents of Austria by Germany. This Government very clearly made known its opinions as to the manner in *which* the seizure of Austria took place and the relation of that seizure to this Government's well-known policy toward the taking of territory by force. *This Government has never taken the position that Austria was legally absorbed into the German Reich.*

VII Department of State Bulletin, 660 (July 27, 1942) (emphasis added).[3] *See also* 2 Whiteman at 329 (quoting June 3, 1942, memorandum of Legal Adviser Hackworth to the Chief of the European. Division stating that while the government had taken "practical" steps, "[w]e have not * * * recognized that Austria is *de jure* a part of Germany".).

Moreover, in 1943, this Court recognized that the United States' actions prior to the Moscow Declaration did not conclusively establish an official policy of the. United States to afford *de jure* recognition to Germany's annexation of Austria. *See United States ex.rel. d'Esquiva* v. *Uhl*, 109 F.2d 903 (2d Cir.1943). In *d'Esquiva*, the Court acknowledged that the determination whether the Anschluss was to be accorded *de jure*, recognition was one for the Executive. *Id*: at 906-07. After reviewing the evidence, the Court determined that the Executive's view on the issue was "not clear." *Id.* at 907. It therefore remanded to the district court for further inquiry of the Department of State. *Ibid.* The President's Moscow Declaration, which issued less than three months after the *d'Esquiva* decision, definitively established the position of the United States on the matter. *See* Langer,173 n.46.

"Political recognition * * * of the annexation of territory, is primarily [a question] of intention." 2 Whiteman at 329 (quoting Hackworth memorandum of June 3, 1942). The

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[3] The Secretary's statement was issued to the press on the same day.

Moscow Declaration must be accepted as the definitive statement of United States policy in this respect. In any event, by formally declaring that the annexation was "null and void," the Moscow Declaration established that the United States would not accord any legal recognition to the Anschluss from the date of annexation. *See* IX Department of State Bulletin, 310 (November 6, 1943) (Allies "consider themselves in no way bound by any changes effected in Austria since that date"). As detailed iii the United States' reply brief, the position that the annexation was null and void has been the premise of United States' foreign policy toward Austria ever since.[4] It should be adhered to here as well. *See, e.g., Oetjen* v. *Central Leather Co.*; 246 U.S. 297, 302-03 (1918) (*de jure* recognition of Mexican government binding on court as to all actions of the government "from the commencement of its existence," including acts prior to recognition by the United States).

Finally, we note that even if plaintiffs could prove that the United States had, prior to the Moscow Declaration, definitely accorded de jure recognition to the Anschluss, it would not support the exercise of jurisdiction over plaintiffs' claims. If Austria ceased to exist as a state at the time of the Anschluss, then it could not be held directly liable for any of Germany's acts. Austria's liability, if any, for the Nazi regime's practices would *only* be to the extent that it was both the successor sovereign to Germany and legally responsible for any liability Germany had for such practices. Questions of

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[4] Significantly, following the war, and even today, the United States regarded as being in force several treaties entered into between the United States and Austria prior to 1938. *See* Treaties in Force; A list of Treaties and Other International Agreements of the US in force on January 1, 2002 (released August 2002) at 12 (listing among agreements in force "Treaty of Friendship, Commerce and Consular Rights, signed at Vienna June 19,1928; entered into force May 27,1931"). This is inconsistent with plaintiffs' theory that the Austrian state with which those treaties were entered ceased to exist in 1938.

state succession are extremely complex issues in foreign relations and may involve sensitive arrangements between foreign governments, as well as political decisions by the Executive. This Court has previously held that the question of a successor state's liability for the acts of the predecessor state is a political question that the courts cannot resolve. *See 767 Third Avenue Associates* v. *Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152, 161-62 (2d Cir. 2000). In any event, even if Austria did inherit liabilities attributable to the German government, it would, as successor sovereign, also have been able to assert a defense of sovereign immunity. *See*, *e.g.*, *id.* at 162-63 (suggesting that successor states to the former Yugoslavia could be sued in United States courts, if at all, only pursuant to the FSIA).[5] Thus, even if a determination could be made that the United States had given *de jure* a recognition to the Anschluss, which it did not, that would not provide a basis for the court to exercise jurisdiction in this litigation.

Respectfully submitted

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[5] The Austrian State Treaty contains no reference to Austria's assumption of Germany's liabilities. And Austria's obligation under the Treaty to return property creates no legally enforceable rights of private parties.

APPENDIX F

U.S. Department of Justice
Civil Division, Appellate Staff
601 D Street, N.W. Rm: 9147
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July 3, 2003

VIA FEDERAL EXPRESS

Roseann B. MacKechnie, Clerk of Court
Second Circuit Court of Appeals
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Garb v. Republic of Poland*, 02-7844

Dear Ms. MacKechnie:

Amicus curiae the United States of America respectfully submits this letter-brief in response to the order of the Court dated June 19, 2003, requesting supplemental briefing with respect to the recent decision in *Abrams*, v. *Societe Nationals des Chemins de Fer*, No. 01-9442, 2003 WL 21362345, (2d Cir.).

Plaintiffs in this action seek to give retroactive effect to two exceptions to immunity recognized by the Foreign Sovereign Immunities Act—the commercial activity exception and the exception for expropriations committed in violation of international law. As discussed in our brief as amicus curiae, governing principles require that each provision of the FSIA be examined independently to determine whether its retroactive application would change the scope of jurisdiction that existed before enactment of *the FSIA. As we* have discussed, and as the district court concluded, plaintiffs could not have asserted their claims in United States courts at the time they arose, and the

subsequent enactment of the FSIA does not permit them *to go forward now*.

A. The *Abrams*, decision confirms that the district court in this case correctly applied this Court's decision in *Carl Marks & Co. Inc.*, v. *Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir:1988) in holding that plaintiffs' claims are barred. The Court in *Abrams*, confirmed that jurisdictional statutes that "affect whether a lawsuit may be brought at all" are subject to the presumption against retroactive application. 2003 WL 21362345, at *13. *See also*, *id.* at *8-*9 (discussing *Hughes Aircraft Co.* v. *United States*, 520 U.S. 939 (1997)). The *Abrams*, decision further makes clear that a court must undertake a distinct retroactivity analysis with respect to each provision of the FSIA. The Court thus rejected the defendant railroad's argument that the FSIA must be given retroactive effect as a whole. As the Court observed, the Supreme Court has made clear that the comprehensiveness of a statute "says nothing" about the "retroactivity of the enactment's *individual provisions*,'" *Abrams*, 2003 WL 21362345, at *11 (quoting *St. Cyr*, 533 U.S. 289, 317 (2001)) (emphasis added). Accordingly, to determine whether immunity applied, the Court considered whether application of particular provisions of the FSIA would constitute a change in United States law and practice regarding foreign sovereign immunity. *Abrams*, 2003 WL 21362345, at *14.

Abrams' approach accords with both this Court's decision in *Carl Marks*, and the reasoning of the D.C. Circuit's recent decision in *Joo* v. *Japan*, 2003 WL 21473010 (D.C. Cir. June 27, 2003). *Carl Marks* and *Joo* each held that the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), could not be the basis for exercising jurisdiction over claims concerning conduct that pre-dated the Executive's recognition of that exception in the 1952 Tate Letter. *See Carl Marks*, 841 F.2d at 27; *Joo*, 2003 WL 21473014, at *4 ("The commercial activity exception to the FSIA, by qualifying

what previously had been the absolute immunity of foreign sovereigns, also 'creates jurisdiction where none previously existed' and therefore affects the substantive rights of the concerned parties."). At the same time, both *Carl Marks* and *Joo* recognized that the FSIA'swaiver exception, 28. U.S.C § 1605(a)(1), could provide a basis for jurisdiction regardless of whether the acts at issue occurred before enactment of the FSIA, because the United States previously recognized a waiver exception to the doctrine of immunity. *See Carl Marks*, 841 F.2d at 27 (indicating that the district court could have exercised jurisdiction over pre-1952 conduct under a theory of waiver if plaintiffs had been able to show that the USSR had "consented to suit"); *Joo*, 2003 WL 21473010, at *7 (waiver exception not satisfied on facts of case).

B. 1. The decision in *Abrams* removes any possible question as to the continuing vitality of *Carl Marks* or the correctness of the district court's analysis.[1] Plaintiffs argue, however, that *Abrams* does not really mean what it says. The Court in *Abrams* held that the FSIA is not expressly retroactive and, applying axioms of statutory construction, concluded that it could derive no implicit intent to make the statute retroactive. Plaintiffs suggest, nevertheless, that this panel is free to limit the *Abrams* analysis to its holding that the FSIA is not explicitly retroactive, *see* P1. June 25 Supp. Br. at 5-8, thus allowing this panel to reinterpret the statute and find that Congress implicitly meant it to apply retroactively.

Plaintiffs are not free to dispense with the holding in *Abrams* in this fashion. And, in any event, the grounds on which they would relitigate the Court's conclusion are unavailing. Plaintiffs premise their argument on government

[1] Plaintiffs' suggestion that *Abrams* implicitly "acknowledg[ed] that *Carl Marks* is no longer good law," P1. June 25 Supp. Br. at 3, gets matters precisely backwards.

statements made following enactment of the FSIA. The *Abrams*, Court, however, was made fully aware of these statements, which do not advance plaintiffs' position in any respect.

Plaintiffs cites 1976 letter from the State Department Legal Advisor to the Attorney General, reprinted in 75 State Dept. Bull. 649 (1976), which stated that, after the effective date of the FSIA, the State Department would no longer "mak[e] sovereign immunity determinations" and that this responsibility would lie "exclusively with the courts." *Id* at 649. *See* P1. June 25 Supp. Br. at 6-7. This statement (which plaintiffs have mischaracterized as a regulation) accurately reflects the United States' understanding of the FSIA. In enacting the FSIA, Congress declared that the "[c]laims of foreign states to immunity *should henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth [in the FSIA]." 28 U.S.C. § 1602. As discussed in our brief (at 11), that provision recognized that under the FSIA, immunity questions would "henceforth" be decided by the courts and not by the Executive Branch. See also Jog, 2003 WL 21473010, at * 6 (D.C. Cir. June 27, 2003) ("We agree with the United States that the most probable meaning of [28 U.S.C. § 1602] is that the State Department would no longer consider petitions for sovereign immunity * * * because henceforth the question of immunity would be addressed solely by the courts applying the new statute"). The shift of responsibility to the courts, recognized by the statute and by the Legal Adviser's letter in the State Department Bulletin, in no way suggests that Congress or the State Department believed that provisions of the FSIA that newly subjected foreign states to suits in United States courts should be given retroactive effect.

Plaintiffs' reliance on the State Department's Statement, cited in *Yessenin-Volpin* v. *Novosti Press Agencv, TASS*, 443 F. Supp. 849 (S.D.N.Y.1978), is similarly misplaced. The

language quoted in *Yessenin-Volpin* stated merely that the "the Foreign Sovereign Immunities Act applies in this case, even though the actions were commenced before January 21,1977." *Id.* at 851 n.l. It was at that time and continues to be the position of the United States that plaintiffs suing foreign governments must look to the FSIA as the basis for obtaining jurisdiction over a foreign state in the courts of this country. *See* U.S. Amicus Br. at 6. (The FSIA now "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia* v. *Nelson,* 507 U.S. 349, 355 (1993).). The question here is whether an exception to immunity recognized by the FSIA should be applied retroactively.

Contrary to plaintiffs' understanding, the *Abrams*, panel was made aware of the statements on which plaintiffs now seek to rely. The defendant-appellant's brief in *Abrams*, made specific reference to both the State Department Bulletin and the *Yessenin-Volpin* decision, and even cited specifically to the footnote in *Yessenin-Volpin* quoting the State Department letter referred to by plaintiffs. *See* Brief for Defendant-Appellee Societe Nationals des Chemins de Fer Francais at 18 n.13, 32-33. *That the Abrams*, opinion does not refer to these statements indicates only that the Court did not believe them relevant to the issue at hand.

2. Plaintiffs contend that *Abrams* compels a reversal here because "given the State Department's recognition of the restrictive theory of sovereign immunity in 1952, Defendants could not have a 'settled expectation' of immunity.in 1956" with respect to expropriations claims. Pl. June 25 Supp. Br. at 10. The difficulty with this argument is that this Court has long made clear that even under the restrictive theory of sovereign immunity adopted by the Tate letter, sovereigns continued to enjoy immunity for expropriations. See U.S. Amicus Br. at 13.14 (discussing *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336

F.2d 354, 360 (2d Cir.1964) (foreign sovereigns retained immunity for "strictly political or. public acts about which sovereigns have traditionally been quite sensitive," including "internal administrative acts" and "legislative acts, such as nationalization"); *Zwack* v. *Kraus Bros.*, 237 F.2d 255, 259 (2d Cir.1956) (noting that Hungary was immune from suit for uncompensated expropriation)). As demonstrated in our brief as amicus curiae, the State Department's adoption of the restrictive theory in *1952* provides no support for the application of the FSIA's expropriation exception to plaintiffs' claims. And, as discussed in our brief (at 14), plaintiffs' claims relate to the expropriation of their property, and not to Poland's subsequent commercial use of it.

3. Plaintiffs also seek to rely on the reference in *Abrams* to the Ninth Circuit's decision in *Altmann* V. *Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), and to the so-called *Bernstein* letter on which the Ninth Circuit relied. As discussed in our brief, the Ninth Circuit in *Altmann*, mistakenly concluded that the Executive Branch, in the *Bernstein* letter, had determined that no claim of sovereign immunity could be raised with respect to the infamous conduct of Nazi officials before and during world war II. The *Bernstein*, letter did not, however, address issues of sovereign immunity. Instead, as discussed in our amicus brief (at 15-18), the *Bernstein*, letter addressed the application of the act of state doctrine, which would ordinarily limit a court's ability to pass on the validity of a foreign government's acts taken within its jurisdiction, as, for example, when a private defendant invokes the acts of a foreign government as a defense in a private party suit.

The *Abrams* panel did not endorse the *Altmann* decision or its construction of the *Bernstein*, letter. Rather, the Court indicated that the district court on remand should consider (in addition to the relevance of corporate *form in* determining immunity prior to the enactment-of the FSIA) whether there

existed, prior to the FSIA's enactment, a separate immunity exception for claims against wartime enemies. *Abrams*, 2403 WL 21362345, at *15 ("the State Department's treatment of ordinary litigation with friendly foreign states in times of peace does *not necessarily* indicate the position the Department would have taken on claims closely related to wartime crimes of an enemy") (emphasis added).

Altmann was decided after oral argument had been held in *Abrams*. The Court in *Abrams* did not have the benefit of full briefing regarding *Altmann* or the views of the United States as to its position regarding the immunity of foreign sovereigns in United States courts for war-related conduct. Plaintiffs' argument here highlights the difficulties created when a court departs from the text of the FSIA and seeks to imply immunities not recognized in the statute. Plaintiffs essentially invite this Court to become involved in the conduct of foreign policy, by trying to discern what lines the State Department would have drawn between one country's conduct and another country's conduct. *See* Pl. June 25 Supp. Br. at 10. Such an approach, which would entail a case-by-case determination of immunity in each suit involving possible retroactive application of the FSIA, would be inconsistent with the statutory scheme, which creates exceptions to immunity for categories of claims. Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607." Those provisions contain no exception for governmental actions based on their infamy or whether the foreign state had been at war with the United States. Nor had the Executive Branch (or the courts) adopted any such blanket exception before enactment of the FSIA. As discussed, the *Bernstein* letter did not create such an exception even for the acts of Nazi officials to which it refers. Still less does it suggest that the United States would have recognized an exception to immunity for other European

governments which were never at war with the United States.[2]

At bottom, plaintiffs seek a political rather than a legal judgment, asking a court to inquire not into established legal standards, but into evidence of expectations of half a century past that are without anchor to governing law then or now. Plaintiffs' invitation to proceed down that path should be rejected. As discussed, the Court's recent *Abrams* decision supports the view, previously adopted by this Court in *Carl Marks*, that the FSIA immunity exceptions cannot be applied to conduct that pre-dated recognition of those exceptions in U.S. law and practice. For these reasons, as well as those expressed in our prior briefs, Poland's assertion of immunity with respect to plaintiffs' claims should be upheld.

Respectfully submitted,

/s/ [Ineligible]

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[2] During World War II, the United States was not at war with the State of Poland, which was invaded by the Nazis. The United States settled the claims of U.S. Nationals for property expropriated by the Polish government by Executive Agreement in 1960. *See* May 2, 2003 Supplemental Letter Brief of the United States at 3 (discussing Agreement Between the Government of the United States of America and the Government of the Polish Peoples Republic Regarding Claims of Nationals of the United States (July 16, 1960), I 1 U.S.T.1953).

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2003, I caused to be dispatched the original and nine. (9) copies of the foregoing letter brief for Amicus Curiae the United States of America to the Clerk of this Court by Federal Express. On the same date, I served two copies of the brief on the following counsel by Federal Express:

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